Supreme Court, U.S.
FILED
OCT - 6 1997
OFFICE OF THE CLERK

No. 97-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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157 pp

QUESTIONS PRESENTED

1. Do producers of articles or consumers of services in interstate commerce have standing to assert claims for violation of the Commerce Clause, or are they not even arguably within the "zone of interests" protected by that Clause?

2. Where a court determines that Article III standing requirements have been met and a constitutional violation has occurred, may that court nonetheless deny standing on "prudential" grounds based in part on its stated concern that allowing those harmed by the violation to recover damages might have a substantial financial impact on the government which enacted the unconstitutional law?

3. Where enforcement of an ordinance which discriminates against interstate commerce is merely "suspended," with the stated purpose of continuing to deter interstate commerce by the uncertainty of its reinstatement, does it continue to discriminate against interstate commerce during the period of its "suspension"?

4. Does an ordinance that prohibits anyone from establishing an in-state waste processing facility to compete with a preferred local facility discriminate against interstate commerce?

LIST OF PARTIES

The *Oehrleins* matter, No. 96-2120 in the court below, and the *Robinson Rubber* matter, No. 96-2710 in the court below, were considered on consolidated appeal in the court of appeals (App. 6a), and judgment was rendered in a single opinion. Consequently, both matters are consolidated in this petition.

Ben Oehrleins and Sons and Daughter, Inc.; Elk River Landfill, Inc.; Gallagher's Service, Inc.; Knutson Services, Inc.; Randy's Sanitation, Inc.; Poor Richard's, Inc.; Vasko Rubbish Removal, Inc.; Wasteco, Inc.; Waste Systems Corp.; and Walter's Recycling & Refuse Service were appellees in the *Oehrleins* matter and are petitioners here.

Robinson Rubber Products Co., Inc.; Dean M. Akins; Patrick Schoenecker; and Brad Robinson, individually and on behalf of all other persons similarly situated, were appellees in the *Robinson Rubber* matter and are petitioners here.

Hennepin County, Minnesota was appellant in both matters below and is respondent here.

Pursuant to Sup. Ct. R. 29.6, the following are the corporate filers and the corporate parents and nonwholly owned subsidiaries of each:

-Ben Oehrleins and Sons and Daughter, Inc. n/k/a Dakota Resource Recovery, Inc. (petitioner; subsidiary of United Waste Systems, Inc. United Waste Systems, Inc., is a subsidiary of USA Waste Services, Inc.)

-Elk River Landfill, Inc. (petitioner; subsidiary of Sanifill, Inc. Sanifill, Inc. is a subsidiary of USA Waste Services, Inc.)

-Gallagher's Service, Inc. (petitioner; subsidiary of United Waste Systems, Inc. United Waste Systems, Inc., is a subsidiary of USA Waste Services, Inc.)

-Knutson Services, Inc. (petitioner; subsidiary of United Waste Systems, Inc. United Waste Systems, Inc., is a subsidiary of USA Waste Services, Inc.)

-Poor Richard's, Inc. (petitioner; subsidiary of United Waste Systems, Inc. United Waste Systems, Inc., is a subsidiary of USA Waste Services, Inc.)

-Randy's Sanitation, Inc. (petitioner; no corporate parent or nonwholly owned subsidiaries)

-Robinson Rubber Products Co., Inc. (petitioner; no corporate parent or nonwholly owned subsidiary)

-Vasko Rubbish Removal, Inc. (petitioner; no corporate parent or nonwholly owned subsidiaries)

-Walters Recycling & Refuse Service (petitioner; no corporate parent or nonwholly owned subsidiaries)

-Wasteco, Inc. (petitioner; subsidiary of United Waste Systems, Inc. United Waste Systems, Inc., is a subsidiary of USA Waste Services, Inc.)

-Waste Systems Corp. (petitioner; subsidiary of United Waste Systems, Inc. United Waste Systems, Inc., is a subsidiary of USA Waste Services, Inc.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ben Oehrleins and Sons and Daughter, Inc., et al., and Robinson Rubber Products Co., Inc., et al. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 115 F.3d 1372. The opinion of the district court in *Oehrleins* (App. B) is reported at 922 F. Supp.

1396, and the opinion of the district court in *Robinson Rubber* (App. C) is unreported. The order of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc (App. D) is unreported.

JURISDICTION

The decision of the court of appeals of which review is sought was rendered in an opinion filed on June 9, 1997. (App. A). The order of the court of appeals denying the timely filed petition for rehearing and suggestion for rehearing en banc was filed July 10, 1997. (App. D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The United States Constitution, in Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The pertinent provisions of Hennepin County, Minnesota, Ordinance No. 12 are set out in the appendix at App. E-F.[1]

STATEMENT OF THE CASE

This case presents important questions concerning the use of the doctrine of prudential standing to prevent relief for admitted violations of the Commerce Clause.

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[1] Hennepin County Ordinance 12 was enacted on December 10, 1985, and amended on October 11, 1988, April 24, 1990, December 21, 1993, August 29, 1994, and June 6, 1995. For the purposes of this petition, the pertinent versions of Ordinance 12 are the October 11, 1988 and December 21, 1993 versions. The October 11, 1988 version is set out in full in the appendix, as is the pertinent excerpt from the December 21, 1993 amendment.

In 1989 Hennepin County implemented a "designation" or "flow control" Ordinance that required generators of solid waste to dispose of it at one of the County's preferred facilities. This precluded access to a free interstate market, and resulted in significantly greater costs of waste disposal for the generators. The court of appeals ruled that Hennepin County's Ordinance violated the Commerce Clause, and that both the generators and haulers of the regulated waste met Article III standing requirements to challenge the Ordinance. The court of appeals erred, however, in also concluding that, even though the generators had standing under Article III, and even though they were named in the Ordinance as a regulated class and were recognized by the County as the class which would bear the economic brunt of the Ordinance, the generators should be denied standing to pursue their Commerce Clause claims for "prudential" reasons, apparently out of concern over the potential economic consequences to the local government entity if standing were allowed. The court of appeals asserted that, as "consumers," the generators were not even arguably within the zone of interests the Commerce Clause was intended to protect, and were instead impermissibly asserting only the third-party rights of those who actually hauled the waste across state lines.

This decision by the court of appeals directly conflicts with Supreme Court precedent. In cases from 1949 through May, 1997, this Court has made clear that protection of consumers from discrimination by any state, including their own, is indeed a purpose of the Commerce Clause. And the generators here are much more than merely indirectly affected consumers; their ability to contract for interstate disposal of their waste is directly and intentionally interdicted by an ordinance which singles them out by name as generators. Their action, brought under 42 U.S.C. § 1983 pursuant to this Court's decision in *Dennis v. Higgins*, 498 U.S. 439 (1991), was

brought to vindicate their own Commerce Clause rights, not the haulers'. The court of appeals' reliance on third-party standing doctrine does not apply to the direct impact suffered by the generators here.

This case also presents for review the court of appeals' holding that, once enforcement of the Ordinance against direct interstate transportation was "suspended until further notice" in December, 1993, a reviewing court could only apply the balancing test of *Pike v. Bruce Church,* 397 U.S. 137 (1970) to test the Ordinance's validity under the Commerce Clause. In so holding, the court of appeals disregarded record evidence relied upon by the trial court of the explicit discriminatory purpose stated by the County to be the motive for its temporary "suspension," declaring instead that, in the court's view, the purpose was not "sinister." Moreover, the court of appeals disregarded the principles of *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951) and *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), in reversing the district court's holding that Ordinance 12, even after suspension of enforcement against interstate shipment, discriminated in effect against interstate commerce. Finally, in failing at least to remand for a factual determination as to purpose and effect, the decision conflicts with the decisions of two other circuits, which recognize that, in circumstances where factual matters are relevant to a determination of which Commerce Clause test to apply, a remand to determine those facts at the trial level is the appropriate remedy.

A. The Facts Material To This Court's Consideration Of The Questions Presented

As enacted, Hennepin County Ordinance 12 directed that all mixed municipal solid waste generated in the county must be disposed at County-designated facilities. Ordinance 12, § II, subs. 2. App. 90a-91a. The primary facility so designated was an incineration facility in which

the County has a substantial financial interest. App. 29a. The Ordinance governed "the transportation and disposal of all Designated Waste generated or disposed of within the county," Ordinance 12, § II, subs. 1 (App. 90a), provided civil and criminal penalties against any person responsible for disposing waste in violation of the Ordinance, *id.* at § VI, subs. 2 (App. 108a-117a), and explicitly defined such persons as including "an individual, business, . . . [or] generator." *Id.* at § I, subs. 13. App. 85a. Generators were thus forbidden, on pain of penalties, from contracting with waste haulers to dispose of their waste at any out-of-state facility.

When the Ordinance was implemented on June 1, 1989, the County used its absolute control of the flow of waste to institute disposal or "tipping" fees at the incinerator which were substantially higher than the interstate market rates. Generators who hauled their own waste paid those fees directly. Those who contracted with haulers also paid those fees when all, or substantially all, of the increased fees were passed through to them in their hauling bills, often by a separate line item component for cost of disposal. The County fully recognized and anticipated a direct impact on the generators' access to out-of-state markets, and a significant increase in their costs, as the inevitable consequence of its actions. *See* App. 10a n.7 (County plan stated that "tipping fees would have to be passed on by haulers to their customers").

In 1993, the court of appeals' decision in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993) invalidated a flow control scheme very similar to that at issue here. Concerned about the potential loss of waste flow to its incinerator, however, the County refused to amend its Ordinance to allow free access to interstate commerce. Instead, it simply changed the definition of Designated Waste to distinguish between in-state and out-of-state disposal, and then issued a separate statement on December 22, 1993, announcing that the

County was "suspending *until further notice*" enforcement of Ordinance 12 as it applied to waste destined for out-of-state disposal. App. 6a (emphasis in original). The County continued to forbid disposal anywhere in Minnesota except County-designated or County-exempted facilities. A memorandum from the County Attorney's Office to the County Administrator explained that suspension of Ordinance 12 was preferable to amendment because the uncertainty attendant to suspension would ". . . put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time." App. 121a. This calculated uncertainty discouraged haulers and disposal companies from investing in transfer stations and other equipment necessary for interstate waste transport. *See* Appellee's Appendix in the Court of Appeals ("AA") at 40-41. To this day, Hennepin County has never amended Ordinance 12 to permit the disposal of waste at out-of-state facilities.

B. Proceedings Below

In 1994, the *Oehrleins* plaintiffs filed suit in the district court. Plaintiffs in the *Oehrleins* case are eight Minnesota waste haulers, one Minnesota landfill, and one Iowa landfill. The *Robinson Rubber* plaintiffs, who filed suit in 1995, are a certified class of residential and commercial waste generators in Hennepin County who incurred the higher cost of waste disposal between June 1, 1989, and the present. Both the *Robinson Rubber* and *Oehrleins* plaintiffs alleged that Ordinance 12 violates the Commerce Clause of the United States Constitution. They requested an injunction against enforcement of the Ordinance and damages under 42 U.S.C. § 1983.

The district court evaluated Ordinance 12 on plaintiffs' motions for partial summary judgment and defendant's motions to dismiss. App. 28a, 45a. The County advanced arguments that no one had standing to challenge

what was by then generally acknowledged to be an unconstitutional ordinance. App. 34a-35a, 49a-50a. The district court rejected these arguments and held that all plaintiffs in *Oehrleins* and *Robinson Rubber* had standing because they had alleged concrete, particularized injuries directly traceable to Ordinance 12 and redressable by the requested relief. App. 34a-35a, 49a-52a. In the case of the *Robinson Rubber* plaintiffs, the court also found that the plaintiffs were direct participants in the interstate market for waste processing services, and therefore they were within the zone of interests of the Commerce Clause. App. 52a-56a.

The district court further held that Ordinance 12 as enacted facially discriminated against interstate commerce, (App. 36a-39a), and that, as enforced after December 22, 1993, Ordinance 12 discriminated against interstate commerce in purpose and effect. App. 39a-42a. The district court found that the County's calculated decision to suspend Ordinance 12's restrictions against interstate transport of waste, rather than to amend the Ordinance to remove the restrictions, revealed a discriminatory purpose, particularly in light of the Deputy County Attorney memorandum stating that the purpose of suspension was to deter haulers from entering into long term contracts for out-of-state disposal. App. 39a-40a. The district court also held that, even as modified, Ordinance 12 discriminated against interstate commerce in effect, because it continued to bar the importation of waste processing services. App. 40a-42a.

The court of appeals, in a consolidated appeal, affirmed the district court's holdings that the *Oehrleins* plaintiffs had standing, and that Ordinance 12 as written and enforced through December 22, 1993 facially discriminated against interstate commerce. App. 8a, 19a-21a. The court of appeals went on to rule, however, that even though the *Robinson Rubber* plaintiffs met all of the Article III requirements for standing, they should

not be allowed to sue because, as "consumers" of waste processing services, their interests were "narrow, personal, and strictly local," and were not within the zone of interests protected by the Commerce Clause. App. 10a-15a. It thus reversed the district court's holding that the *Robinson Rubber* plaintiffs had standing to collect damages for their injuries suffered under the Ordinance, whether before or after December 22, 1993. *Id.* The court also held that, in its view, the Deputy County Attorney's memorandum concerning the suspension of interstate enforcement was not "sinister" and did not reveal a purpose to discriminate against interstate commerce, and that Ordinance 12 as enforced after December 22, 1993 regulated in-state and out-of-state interests evenhandedly. App. 23a n.12. The court of appeals therefore remanded that part of the *Oehrleins* case for a determination under the test enunciated in *Pike v. Bruce Church*, 397 U.S. 137 (1970). App. 26a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS MISUSED THE DOCTRINE OF PRUDENTIAL STANDING TO DENY RELIEF FOR ADMITTED VIOLATIONS OF THE COMMERCE CLAUSE

The right to engage in interstate commerce is one of the individual "rights, privileges, and immunities" guaranteed by the United States Constitution and actionable under 42 U.S.C. § 1983. *Dennis v. Higgins*, 498 U.S. 439, 449-450 (1991). The court of appeals eviscerated *Dennis* by denying standing, on "prudential" grounds, to those individuals most injured by the closure of an interstate market in waste disposal—the generators of the waste. This application of the doctrine of prudential standing conflicts with the purposes of that doctrine and this Court's precedent, and therefore merits review by this Court.

A. This Court Has Made Clear That The Generators, Even If Characterized As Consumers, Are Within The Zone Of Interests Protected By The Commerce Clause

To satisfy the "zone of interests" test of prudential standing, this Court has made plain a plaintiff need only show that " 'the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997) (emphasis supplied) (quoting *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970)). In the instant case, the court of appeals began its analysis of standing by stating its belief that " 'consumer standing' in Commerce Clause cases has not been squarely considered by the Supreme Court." App. 10a. Characterizing the generators as "consumers of waste disposal services," the court of appeals then reasoned that the Commerce Clause is only "intended to prevent economic protectionism and retaliation among the states," found that higher garbage bills for the generators will not provoke "jealousies and retaliatory measures" in other states, and held that the generators, as mere local "consumers," were not within the zone of interests of the Commerce Clause. App. 14a-15a.[2]

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[2] The zone of interests test appears to have been applied by this Court to the Commerce Clause on only two prior occasions, and in both cases standing was affirmed. *Boston Stock Exchange, et al. v. State Tax Commission, et al.*, 429 U.S. 318 (1977); *Dennis v. Higgins, supra*. In *Dennis*, the Court stated simply that the Commerce Clause "imposes limitations on state regulation of commerce and is the source of a right of action *in those injured* by regulations that exceed such limitations." 498 U.S. at 450 (emphasis supplied). The two most recent decisions by the Court interpreting the Commerce Clause did not even address the zone of interests test, although both governmental defendants argued that plaintiffs lacked standing. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S. Ct. 1590 (1997); *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997).

Both the court of appeals' ruling and its rationale are in conflict with this Courts' precedent. In *Dennis*, the state government made an argument identical to the rationale adopted by the court of appeals here, contending that the Commerce Clause was "not designed to benefit individuals, but rather was designed to promote national economic and political union." *See* 498 U.S. at 449. This Court rejected that characterization, explicitly stating that the Commerce Clause is for the benefit of individuals engaged in interstate commerce, and further emphasizing:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise *every consumer* may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. (emphasis added) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)).[3] Whether generators are considered to be producers of waste or consumers of waste disposal services, directly regulated or indirectly burdened, it is simply not possible to conclude that the generators here are not even *arguably* within the zone of interests of the Commerce Clause given this Court's statement, made in *H.P. Hood & Sons* and requoted in at least five decisions of the Court since then.[4]

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[3] *See also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 117 S. Ct. at 1599 n.11 (1997) ("The town argues that 'the Commerce Clause protects out-of-state competitors but does not protect out-of-state consumers' . . . our cases have rejected this view").

[4] *General Motors Corp. v. Tracy*, 117 S. Ct. at 824; *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 206 (1994); *Dennis v.*

This case squarely presents the question of whether the Court's statement is true and must be followed by the lower courts.

This Court has also explicitly rejected the court of appeals' reasoning that a plaintiff must be "directly assessed" by the challenged law or "directly subject" to the discrimination to fall within the zone of interests. App. 12a. In *Camps*, the defendant town attempted this very argument. The Court responded, "we recognize that here the discriminatory burden is imposed on the out-of-state customer *indirectly by means of a tax imposed on the entity transacting business* with the non-Maine customer. This distinction makes no analytic difference." 117 S. Ct. at 1600 (emphasis supplied). Similarly, in *Boston Stock Exchange, et al. v. State Tax Commission, et al.*, 429 U.S. 318 (1977), regional stock exchanges challenged a New York tax assessed only on individuals doing business with the exchanges, not on the exchanges themselves. As characterized by the Court, "[t]he Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax *indirectly* infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.' " 429 U.S. at 320-321, n.3 (citing *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970) (emphasis supplied)). The *Dennis* Court later cited to this exact footnote from *Boston Stock Exchange* in holding that the Commerce Clause confers rights actionable under 42 U.S.C. § 1983. *See* 498 U.S. at 447.

In seeking to defend its holding by citing to *Individuals for Responsible Gov't. Inc. v. Washoe County*, 110 F.2d 699 (9th Cir. 1997), the court of appeals in fact seri-

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Higgins, 498 U.S. at 449; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976); *Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 19, 31 (1974).

ously misinterpreted the Ninth Circuit's holding therein. In that case, plaintiffs alleged that a county ordinance requiring them to use a county-approved waste hauler rather than haul waste themselves violated the Commerce Clause by depriving them of the ability to personally haul their waste out-of-state. In fact, however, the authorized hauler was free to haul waste out-of-state, and the court held that the plaintiffs lacked standing because "their injury (being forced to pay for services they do not want) would exist even if [the authorized hauler shipped all their waste to other states]." *Id.* at 703-704. Because their complaint thus did not involve any issue of the free movement of waste in the interstate market, the plaintiffs were not within the zone of interests of the Commerce Clause. *Id.* This is in marked contrast to the Hennepin County generators, whose injury is directly attributable to Hennepin County's prohibition of the free interstate movement of waste. Rather than supporting the court of appeals' interpretation of the zone of interests of the dormant Commerce Clause, *Washoe County* conflicts with it and supports Petitioners here.

B. Ordinance 12 Violates The Waste Generators' Personal Rights To Engage In Interstate Commerce

The court of appeals' alternative reason for denying standing was that the generators are not engaged in interstate commerce, and thus have no personal right to assert a Commerce Clause violation, because the haulers, rather than the generators, are the ones actually transporting waste. The court of appeals characterized the generators as mere "purchasers of disposal services," with "narrow, personal, and strictly local" harms. App. 13a-15a. While the court of appeals acknowledged that the generators are subject to the terms of Ordinance 12, it held that the generators had not alleged that they were "directly harmed by the enforcement of Ordinance 12 against them," since their allegation of injury was that they paid increased costs "because of the enforcement of designation

requirements against haulers." App. 10a n.6. Consequently, the court of appeals concluded that the generators were not asserting their own rights, and denied them standing under the third-party test set forth in *Warth v. Seldin*, 422 U.S. 490 (1975). App. 13a-14a. In essence, the generators were denied standing because they do not personally carry their waste across state lines.

Three fundamental errors underlie this alternative conclusion. First, Ordinance 12 in purpose and effect was in fact targeted primarily at waste generators and only incidentally at haulers. Not only are generators named in the Ordinance itself, but the record is clear that Hennepin County "fully anticipated that designation would result in consumers paying higher disposal fees." App. 10a. Second, the fact that the County forced the haulers to use designated facilities does not mean that the generators' conduct was unregulated: the only way for a generator to dispose of its waste is by contracting with a licensed waste hauler or by securing a license for itself. Ordinance 12, § III (App. 93a-94a). Indeed, those generators who did haul their own waste were subject to the same enforcement as the commercial haulers. *Id.* The court of appeals thus created a completely arbitrary distinction—generators who haul their own waste presumably have standing, but generators who hire someone else to haul their waste do not. The court of appeals' implication that an individual is only engaged in interstate commerce if he or she personally travels across state lines is contrary to decades of this Court's Commerce Clause precedent. Finally, the court of appeals created a new test for constitutional injury, essentially holding that "merely paying more" is not sufficient injury for purposes of invoking the Commerce Clause.

The court of appeals' myopic view of what behavior constitutes engagement in interstate commerce has been rejected by this Court as recently as the 1997 Term in *Camps, supra*. In *Camps*, the Court held that the reason-

ing of the Court's affirmative Commerce Clause cases is applicable to the dormant Commerce Clause. *Id.* at 1596-97. The Court also noted that purchasers are "unquestionably" engaged in commerce subject to the Commerce Clause, and reiterated that "[e]ven when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' " *Id.* (citations omitted). The court of appeals here improperly departed from *Camps* by focusing on how the out-of-state *campers* as consumers differed from the generators here, (App. 12a n.8), when in fact it was the in-state *camp* as a provider and a *purchaser* of services that was engaged in interstate commerce and had standing to sue. *Camps*, 117 S. Ct. at 1596-97.

Similarly, in *General Motors Corp. v. Tracy, supra*, also decided last Term, the Court held that General Motors had standing to challenge Ohio's tax on purchases of out-of-state natural gas. The Court stated:

> "[c]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates, and customers of that class may also be injured, as in this case where the customer is liable for payment of the tax *and as a result presumably pays more for the gas* it gets from out-of-state producers and marketers. *Consumers who suffer this sort of injury* from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III."

Id. at 818 (emphasis supplied). So obvious was General Motors' standing as a consumer that the Court did not even deem it necessary to address the requirements of prudential standing. Neither was it necessary to inquire into prudential standing on similar facts in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (in state liquor dealer has standing to challenge tax discriminating against out-of-state liquor) or *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996) (in-state stockholder has standing to

challenge regime discriminating against out-of-state stock issuers).

The court of appeals attempted to distinguish *General Motors* and *Bacchus Imports* by noting that the businesses there were legally liable to pay the challenged taxes. App. 12a. But this Court referenced legal liability merely as one type of evidence of injury under Article III, *see General Motors*, 117 S.Ct. at 818; *Bacchus Imports*, 468 U.S. at 267, not as a new requirement for prudential standing. Nothing in those opinions purports to limit standing only to one legally liable for the tax payment, as opposed to one demonstrably suffering injury from a Commerce Clause violation. Not only has this Court in *Camps* and *Boston Stock Exchange* explicitly rejected "direct regulation" as a requirement for standing, this Court held in *Bennett v. Spear*, 117 S. Ct. at 1167-68, that an *un*regulated party with interests *contrary* to the overall purpose of the statute could nonetheless have standing if its complaint touched upon a purpose of the statute.[5]

The court of appeals' reasoning, if correct, would have defeated standing for the landfill plaintiff in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Nat-*

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[5] The court of appeals' error is akin to the Ninth Circuit's in *Bennett v. Spear*, and its citation to *Bennett* highlights that the message of *Bennett* has been misunderstood. In *Bennett*, the Ninth Circuit denied standing based on the overall purpose of the Endangered Species Act, rather than the purpose of the particular provision of law upon which the plaintiff relied. 117 S. Ct. at 1167. This Court reversed, holding that even plaintiffs whose interest is *contrary* to the overall purpose of a statute have standing if they fall within the statutory provision that forms the basis of their complaint. *Id.* Here, the court of appeals focused on one purpose of the Commerce Clause (prevention of economic balkanization) and ignored another purpose (protection of producers and consumers) in holding that the generators lacked standing. Indeed, since the ultimate effects of balkanization are felt by producers and consumers, it would be logical to conclude that their protection is the "real" overall purpose of the Commerce Clause, and that the prevention of balkanization is merely the means to that end.

ural Resources, 504 U.S. 353 (1992). In that case, an in-state landfill successfully challenged a county regulation barring the importation of waste from out-of-state generators. In striking down the regulation, this Court did not focus on transactions between the landfill and the *haulers*, but between the landfill and the *generators*: "Whether the business arrangements between out-of-state generators of waste and the Michigan operator are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." *Id.* at 359.

A transaction cannot be determined to be "interstate" for purposes of standing for one party to that transaction but not for the other. There is no principled distinction between an in-state landfill challenging restrictions on the import of waste from out-of-state generators, and in-state generators challenging restrictions on the export of waste to out-of-state landfills. Each depends critically on access to out-of-state markets, and each is therefore protected by the Commerce Clause. As stated in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202-203 (1994), "[f]or over one hundred and fifty years, our cases have rightly concluded that the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer—is invalid . . . ." *See also Camps*, 117 S.Ct. at 1600 (in-state camp has standing to challenge tariff which burdens out-of-state customers); *cf. Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 344 (1977) (apple growers who faced increased labeling and marketing costs to conform with North Carolina law suffered "direct and sufficient" injuries; growers as well as dealers satisfied standing requirements, and therefore association representing growers had standing).[6]

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[6] *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), further demonstrates the error of the court of appeals' view of standing. In that case, Justice Scalia, in dissent, argued that the majority's theory of standing in that case was too expansive, although he acknowl-

The Seventh Circuit's view of standing also conflicts sharply with that expressed by the Eighth Circuit in this case. The Seventh Circuit has held that a broker arranging for the backhauling of solid waste has standing to challenge a ban on backhauling. "The plaintiffs do not themselves engage in backhauling; their business consists in arranging for others to do so. It is undisputed that their business would suffer severe adverse effects from enforcement of the backhaul ban. Such economic injury, *though indirect*, is sufficient to confer standing." *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1274 (7th Cir. 1992) (emphasis supplied).

The court of appeals' *Warth v. Seldin* third-party standing analysis is thus plainly irrelevant. The generators are seeking to vindicate their own interstate commerce rights, not the rights of the haulers.

C. The Court Of Appeals Misused Prudential Standing To Insulate Local Government From The Damages Caused By Its Constitutional Violation

The court of appeals' judgment denying standing to the generator plaintiffs should be reviewed by this Court because the lower court's holdings on prudential standing and the Commerce Clause are seriously at odds with this Court's precedent, as noted above. That judgment should

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edged that in his view Wyoming would have had standing "if it bought or sold coal, or otherwise directly participated in the coal market." *Id.* at 470. Here, it is undisputed that the generators are direct participants in the solid waste market, being, after all, the creators of the market. In addition, Justice Scalia noted that the "zone of interests" test "performs the same role as many other judge made rules circumscribing the availability of damages in tort and contract litigation—doctrines such as foreseeability and proximate cause . . . ." *Id.* at 473. Here, the court of appeals conceded that the generators met those tests, that Hennepin County foresaw the effects of Ordinance 12 on generators, and that, as foreseen, Ordinance 12 caused generators' bills to go up. App. 9a-10a. Plaintiffs here thus would have standing under either the *Wyoming* majority view *or* Justice Scalia's dissenting opinion.

also be reviewed because it is an entirely inappropriate use of the prudential standing doctrine to mask judicial policymaking. It is apparent that the court of appeals' willingness to subvert the concept of "prudential" standing was the result of its concern that generator standing in this case would affect local governments:

> We are mindful that granting standing to consumers bearing passed-on costs in Commerce Clause cases could have serious repercussions on state and local governments' ability to enact economic regulations. This is because they would risk enormous liability if such regulation is later invalidated. Here, for example, the waste generator plaintiffs' damage claims exceed $100 million. Especially in the current context, where the limits of local authority to regulate waste streams are still unclear, such risk presents a heavy burden to good faith efforts to enact valid laws intended to further important local goals.

App. 15a n.9. In so many words, the court of appeals acknowledged it was using "prudential" standing to create a "good faith" exception for local governments which would otherwise be required to compensate victims of their unconstitutional acts.[7]

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[7] There is no legitimate concern that acknowledging standing here will open the floodgates to suits by any and all end-line consumers. Unlike the typical "end-line" consumer, the waste generators here were explicitly regulated by Ordinance 12, and were, indeed, a target of Ordinance 12. App. 9a-10a. The generators are at the "front-line" of the challenged Ordinance. Moreover, the chain of liability in other consumer suits will be routinely cut by standard principles of foreseeability and proximate cause—principles which the court of appeals has acknowledged in fact favor generator standing in this case. *See id.* As the court of appeals itself noted, when a plaintiff is not the object of the government action, standing is substantially more difficult to establish. App. 9a (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). As *Lujan* makes clear, the difficulty of establishing standing for such plaintiffs stems from the difficulty of meeting the Article III requirements of injury-in-fact, causation, and redressability when these depend " 'on the unfettered choices made by independent actors not before the courts

This Court, however, has explicitly rejected the argument that the financial consequences of an unconstitutional act justify withholding relief. *McKesson v. Division of Alcoholic Beverages and Tobacco*, 486 U.S. 18, 51 (1990) (due process requires a "clear and certain remedy"); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. at 393-94 (1994) (revenue generation is not a local interest that can justify discrimination against interstate commerce). *See also Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 112 F.3d 652, 666-67, 671-672 (3rd Cir. 1997), petitions for certiorari pending as Nos. 97-400 and 97-430. And, in any event, the consequences feared by the court of appeals are not borne out by the facts here. By the end of 1993 the County had amassed a reserve fund of some $22.9 million in "retained earnings" from illegally imposed tipping fees, and thus could easily absorb the impact of providing some meaningful remedy to those suffering the injury. AA 217.

The opinion below reconfigures what was intended to be a "not especially demanding" test, *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987), designed to ensure that the court is not "called upon to decide abstract questions of wide public significance," *Warth*, 422 U.S. at 500, into a lens through which judges can refocus the law to fit their own image of who should be allowed to sue. In this case, the court of appeals was plainly moved by the County's concerns over the prospect of a large damage claim against it (App. 15a n. 9),

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and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict.'" *Id.* (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). There is thus no need to subvert the prudential standing doctrine to protect against future payments to unforeseen plaintiffs of damages not proximately caused. Here, the court of appeals concedes that all the Article III elements have been satisfied. App. 10a. Because Article III effectively guards the courthouse doors from an indiscriminate number of consumer actions, the tenets of prudential standing need not be distorted to perform that task.

and thus the court simply defined the problem away. If allowed to stand, the court of appeals' new approach to prudential standing will result in other claims simply being defined away, with little predictability other than the judges' personal agendas. This is not the model of "judicial self-governance" envisioned by this Court. *Warth*, 422 U.S. at 500.

II. THE COURT OF APPEALS WRONGLY CONCLUDED IT COULD DISREGARD EVIDENCE OF A DISCRIMINATORY PURPOSE AND EFFECT AGAINST INTERSTATE COMMERCE

The error below on standing is compounded by a lack of regard for the substantive law. It is well settled that a law may discriminate against interstate commerce on its face, in its purpose, or in its effect. The court of appeals, however, improperly disregarded evidence of discriminatory purpose in the way Hennepin County attempted to avoid the law when it "suspended" its designation Ordinance, and further erred in directing the district court to evaluate Ordinance 12 after suspension only under the balancing test enunciated in *Pike v. Bruce Church*. The court of appeals also erred in its interpretation of the effect of Ordinance 12 after 1993, ignoring the discriminatory advantages conveyed on the preferred facility at the expense of out-of-state interests.

A. Evidence Of Discriminatory Purpose

This Court has recognized that a discriminatory purpose alone is sufficient to render a statute invalid under the Commerce Clause. *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 344 n. 6 (1992); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977). As evidence of discriminatory purpose, the district court noted that Hennepin County never amended Ordinance 12 to permit out-of-state disposal of County waste. App. 39a-40a. Instead, Hennepin County attempted to dissuade generators and haulers from fully

utilizing out-of-state facilities by merely temporarily suspending interstate enforcement of the Ordinance, warning in a letter sent to all haulers that the suspension would only be in effect "*until further notice.*" App. 6a (emphasis in original). Moreover, a memorandum from the Deputy County Attorney explained that the rationale behind merely suspending enforcement of the Ordinance was to ". . . put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time." App. 121a. The district court recognized that this evidence was sufficient to show that the County's original discriminatory purpose which produced the Commerce Clause violation was not corrected by "suspension" of interstate enforcement. App. 40a.

The court of appeals, however, ignored the obvious implications of the County's action, stating that it was reluctant to impute statements by the Deputy County Attorney to the County (App. 23a n. 12), thereby disregarding the fact that this Court has previously observed—in the Commerce Clause context—that such statements may be used to determine the purpose behind an enactment. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. at 353 (taking statement by North Carolina Agriculture Commissioner as evidence of North Carolina legislature's intent). The court of appeals went on to rationalize that any threat of reinstatement of the out-of-state prohibition "simply evaporates given our holding that such enforcement would violate the Commerce Clause" (App. 23a n. 12), overlooking the fact that no hauler had the benefit of the court of appeals' ruling until June 9, 1997. For the three and a half years preceding the court of appeals' ruling, the uncertainty of the "suspension" continued to have the deterrent effect intended by the County; monetary damages suffered during that period did not "evaporate" because of the court's later ruling.

In ruling that the "suspension" and explanatory memorandum did not evidence discriminatory purpose because

"we do not find this language as sinister as plaintiffs suggest," *id.*, the court of appeals created a new requirement that the purpose of the discrimination must involve some kind of "bad faith," rather than merely a purpose to deter interstate commerce. This additional element of proof clashes with the rule stated in *Chemical Waste Mgmt. v. Hunt*, 504 U.S. at 344 n. 6, and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. at 352-53, that a discriminatory purpose itself is sufficient.

B. Evidence Of Discriminatory Effect

Whether or not partial "suspension" of the Ordinance actually allowed free out-of-state shipment, limiting in-state disposal to the preferred County facility created the same improper interference with free commerce as the local processing requirement invalidated in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). In *Dean*, out-of-state interests who wanted access to the Madison milk market could obtain it, as long as they came within five miles of the city to compete. Under Ordinance 12 as enforced, out-of-state interests could obtain access to the Hennepin County solid waste market, but only if they kept their facilities on the other side of the state border. While the economics of those two industries resulted in different methods of protecting against out of state competition, the net discriminatory result is the same.

The court of appeals confused a marginal benefit to out-of-state interests in one narrow aspect of the market with the elimination of discrimination. After the suspension of enforcement of Ordinance 12 against out-of-state shipments, out-of-state disposal facilities theoretically were in a better position than privately owned in-state facilities, since the latter were locked out of the Hennepin County market entirely. Out-of-state facilities were nonetheless seriously disadvantaged in relation to the preferred local facility, which enjoyed substantial regulation-conveyed benefits. As the district court noted, "the distinctions drawn by the ordinance are not, as the County suggests,

between in-state and out-of-state landfills; they are between its local proprietary facilities and all other interests, including out-of-state facilities." App. 42a. The *Dean Milk* Court explicitly rejected the argument that the relevant inquiry is between non-preferred in-state facilities and out-of-state facilities: "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." 340 U.S. at 354 n. 4.

The regulation-conveyed advantages take several forms. First, the designated facilities need not compete with any other facilities in the state of Minnesota. This gives them a monopoly over any waste which for any variety of reasons will not or cannot be transported out-of-state. With this secure base of waste supply, the designated facility has the economic power to compete more aggressively with out-of-state facilities for the segment of the market potentially available for out-of-state disposal. AA 14. Additionally, the waste industry is highly location sensitive. Out-of-state interests cannot neutralize the designated sites' locational advantage by siting facilities in Minnesota in or near Hennepin County, because Ordinance 12 forbids any such competing facilities from receiving Hennepin County waste.

Second, as set forth in the Deputy County Attorney's memorandum, the threat of renewed enforcement of the prohibition against out-of-state disposal was expected and intended to discourage haulers from entering into lower-cost long term contracts with out-of-state facilities, which Hennepin County staff recognized would pose a risk to the County system. AA 52. In addition, the threat of renewed enforcement discouraged capital improvements needed to transport County waste interstate. Investment in transfer stations and long-haul trucks or rail cars involved significantly greater risk when prohibitions on interstate waste transport could have been renewed at any time. Hennepin County recognized these disincentives, AA

40-41, and hoped to use them to its advantage in protecting its own preferred facility. App. 40a.

Third, Hennepin County amassed a $22.9 million reserve of funds accumulated during the period that all interstate transport of waste was prohibited. AA 217. This illegally gotten "war chest" could be used by Hennepin County to underwrite its tipping fee to discourage competition from interstate disposal. AA 67, 217. Governments may subsidize preferred facilities out of legitimately raised revenues, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. at 394 (1994), but it is hardly "evenhanded" to grant the preferred facility a local monopoly and subsidize it in competing with out-of-state facilities with money raised through unconstitutional mechanisms.

Finally, in evaluating the effect of intrastate designation, it is not sufficient to examine Ordinance 12 in isolation. Courts must examine the cumulative effect of many or all jurisdictions enacting similar statutes. *Healy v. Beer Institute*, 491 U.S. 333, 336 (1989). Injury to interstate commerce occurs where "economic balkanization within a state" collides with an "integrated interstate market." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. at 203.[8] Under widespread so-called "intrastate" designation, a company wishing to offer waste services in State A must locate its disposal facility in State B; and must also erect a separate facility in State A to compete for State B's waste. Each facility is both denied access to local waste and forced to compete at a location-disadvantage to preferred facilities in other states. Even though there is interstate competition in theory, in practice such designation "violates the principle of the unitary national market by handicap-

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[8] Designation carved Minnesota into a patchwork of solid waste fiefdoms, and its popularity in other jurisdictions is apparent. *See, e.g., Carbone*, 511 U.S. at 406 (O'Connor, J. concurring and collecting statutes).

ping out-of-state competitors, thus artificially encouraging in-state production [at the preferred facilities]. . ." *West Lynn Creamery*, 512 U.S. at 198.

C. The Court Of Appeals Overstepped Its Authority

The record before the court of appeals contained evidence of discriminatory purpose and discriminatory effects even after "suspension" of interstate enforcement in 1993. When faced with conflicting evidence as to the purpose or effect of a statute under a Commerce Clause inquiry, other Circuits have reversed and remanded to the district court, rather than usurp the role of the fact-finder. *See Chambers Medical Technologies v. Bryant*, 52 F.3d 1252, 1260 (4th Cir. 1995) (remanding Commerce Clause claim to district court to determine whether discriminatory purpose or effect was present to trigger strict scrutiny because appeals court was "ill-suited to resolve this question in the first instance due to the inherently factual nature of this inquiry"); *Harvey & Harvey v. County of Chester*, 63 F.3d 788, 807 (3rd Cir. 1995) (remanding for further factual findings to determine whether flow control ordinance has a discriminatory purpose or effect and is subject to strict scrutiny or whether to apply *Pike* balancing test). At a minimum, it was improper for the Court of Appeals to disregard record evidence of discriminatory purpose and effect. Its willingness to do so in fact changed the protection offered by those proscriptions. That change, along with the court of appeals' misuse of the prudential standing doctrine, should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 6, 1997

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 96-2120, 96-2170

BEN OEHRLEINS AND SONS AND DAUGHTER, INC.; ELK RIVER LANDFILL, INC.; GALLAGHER'S SERVICE, INC.; KNUTSON SERVICES, INC.; RANDY'S SANITATION, INC.; POOR RICHARD'S, INC.; VASKO RUBBISH REMOVAL, INC.; WASTECO, INC.; WASTE SYSTEMS CORP.; WALTER'S RECYCLING & REFUSE SERVICE,

Appellees,

v.

HENNEPIN COUNTY,

Appellant,

STATE OF MINNESOTA, by its Attorney General and its Office of Environment Assistance; OGDEN PRODUCTS, INC.,

Amici Curiae.

ROBINSON RUBBER PRODUCTS, CO., INC.; DEAN M. AKINS; PATRICK SCHOENECKER; BRAD ROBINSON, Individually and on behalf of all other persons similarly situated,

Appellees.

v.

HENNEPIN COUNTY,

Appellant,

STATE OF MINNESOTA, by its Attorney General and its Office of Environment Assistance, OGDEN PRODUCTS, INC.,

Amici Curiae.

Submitted March 12, 1997
Decided June 9, 1997

Before WOLLMAN and BEAM, Circuit Judges, and LAUGHREY,[1] District Judge.

BEAM, Circuit Judge.

This case involves the authority of a local government to regulate the flow and disposal of solid waste. Hennepin County, Minnesota, enacted a "flow control" regulation ("Ordinance 12") that required most County waste to be delivered to County-designated transfer stations or processing facilities. The County later suspended enforcement of Ordinance 12 with respect to waste destined for disposal outside of Minnesota, but continued to require all waste remaining in the state to go to the designated facilities. Local and out-of-state waste haulers, landfills, and residential and commercial waste generators brought suit, alleging that Ordinance 12 violates the Commerce Clause of the United States Constitution.

After finding that both sets of plaintiffs have standing, the district court concluded that Ordinance 12, both as written and as currently enforced, discriminates against interstate commerce and permanently enjoined its enforcement. We hold that the "waste generator" plaintiffs—that is, customers of waste haulers—do not have standing. With respect to the merits, we agree that those provisions of Ordinance 12 that prevent the delivery of County waste to out-of-state processors are unconstitutional. We conclude, however, that as applied solely to intrastate waste disposal, Ordinance 12 does not discriminate against interstate commerce, and reverse and remand that portion of the district court decision.

I. BACKGROUND

Over the past twenty years or so, state and local governments have frequently faced the problem of how, within

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[1] The Honorable Nanette K. Laughrey, United States District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

permissible constitutional boundaries, to regulate the flow and disposal of solid waste. As the Supreme Court recently noted, "[a]s solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment." *C & A Carbons, Inc. v. Town of Clarkstown*, 511 U.S. 383, 385-86, 114 S.Ct. 1677, 1680, 128 L.Ed.2d 399 (1994).[2]

One of Minnesota's efforts in this regard is the Minnesota Waste Management Act of 1980. The Act was intended to protect the state's environment and the public health by reducing the amount of waste generated and disposed of, improving energy recovery from waste, coordinating waste management among political subdivisions, and developing waste facilities. Minn.Stat. § 115A.02(a). The Act sought to create an "integrated waste management system" in Minnesota, with a hierarchy of preferences for various waste management practices. In order of preference, the Act addresses waste reduction and

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[2] The Supreme Court has considered constitutional challenges to such regulatory efforts five times. *See Carbone*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399; *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). There have been many other challenges in the Courts of Appeal. *See, e.g., SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir.1995); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir.1993); *Southeast Arkansas Landfill, Inc. v. State of Arkansas, Dep't of Pollution Control and Ecology (In re Southeast Arkansas Landfill, Inc.)*, 981 F.2d 372 (8th Cir.1992). *See generally*, John Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and its Progeny*, 7 Vill. Envtl. L.J. 203 (1996); Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. Rev. 529 (1994).

reuse, recycling, composting, resource recovery, and land disposal. *Id.* at § 115A.02(b).

To meet these goals, the Act requires counties to implement plans for local waste management. *Id.* at § 115A.46. In adopting these plans, counties must consult with persons providing waste collection processing, and disposal services, and must submit proposed plans to the state's Office of Environmental Assistance for approval. *Id.* at §115A.46, Subd. 1(d) & (e). The Act also allows counties to develop designation plans which require all or part of county waste to be delivered to one or more county-designated transfer or disposal facilities. *Id.* at §§ 115A.80—115A.85. Certain counties must seek approval for waste management plans and designation plans from the Metropolitan Council, a planning and development agency created by the state legislature for the seven-county Minneapolis-St. Paul metropolitan area. *Id.* at § 473.803, Subd. 1.

In accordance with the Act, Hennepin County (which includes Minneapolis) created a waste management master plan in 1981. In April 1985, the County obtained approval from the Metropolitan Council for a designation plan to supplement its master plan. The County determined that in order to reduce the amount of County waste disposed of in landfills, it would concentrate the disposal of County waste in "waste-to-energy" processing facilities. Central to this goal was the construction of a state-of-the-art incinerator in Minneapolis that would convert certain solid waste into electricity. In order to finance the construction of the facility, the County issued approximately $150,000,000 in bonds. The resulting facility, the Hennepin Energy Resource Corp. ("HERC"), while constructed with public funds, is owned and operated by two out-of-state corporations.

In order to implement its designation plan, the County adopted Ordinance 12 in December of 1985. The Ordinance, which took effect June 1, 1989, was intended in

part to provide "assurance that sufficient quantities of designated waste will be delivered to the [HERC] Facility." [3] Hennepin County Board Resolution No. 85-12-0823-R1, *reprinted in* Appellant's App. at 23. To provide this assurance, the Ordinance requires that all "designated waste," which includes most forms of non-hazardous commercial and residential solid waste, be delivered only to County-designated transfer stations or processing facilities. The Ordinance itself originally designated certain interim transfer stations and one processing facility: the HERC incinerator. Currently, HERC and one other privately owned waste-to-energy facility located outside Minneapolis are the only designated processing facilities. There are currently eight designated transfer stations, which receive the bulk of the solid waste that supplies the HERC facility.

The Ordinance provides that the County can designate additional facilities. The Ordinance also exempts from the designation requirement any waste processed at facilities already in existence at the time the Metropolitan Council approved the designation plan in 1985. As required by the Waste Management Act, Minn.Stat. § 115A.893, the Ordinance provides that non-designated facilities may petition the County for exclusion of some waste from designation. The County maintains that it has granted several such exclusions, including one to plaintiff Knutson Services, Inc. Haulers who deliver designated waste to non-designated facilities are subject to penalties, including misdemeanor charges, fines, costs and special assessments, injunction, and the suspension or revocation of their hauling license. The County has actively monitored haulers and has imposed penalties on companies found to have violated the Ordinance.

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[3] Ordinance 12 lists other goals in its preamble, including the reduction of the volume of County waste deposited in landfills, the recovery of materials and energy from solid waste, the conservation of resources, and the furtherance of waste management policies.

In 1993, the County Board passed a resolution to cease enforcement efforts against haulers who delivered designated waste to facilities outside the state. Pursuant to this resolution, the County notified waste haulers that it had "suspended, *until further notice,* enforcement actions relating to Hennepin County generated waste destined for disposal outside the State of Minnesota." Appellant's App. at 156 (emphasis in original). The County acknowledges, however, that it has continued to enforce the Ordinance with respect to waste delivered to non-designated facilities within Minnesota.

In 1994, the *Oehrleins* plaintiffs filed suit in the district court. Plaintiffs in the *Oehrleins* case are eight Minnesota waste haulers, one Minnesota landfill, and one Iowa landfill. The *Robinson Rubber* plaintiffs, who filed suit in 1995, are a certified class of residential and commercial "waste generators" in Hennepin County who paid for waste removal between June 1, 1989, and the present. Both the *Robinson Rubber* and *Oehrleins* plaintiffs alleged that Ordinance 12 violates the Commerce Clause of the United States Constitution. They requested an injunction against enforcement of the Ordinance and damages under 42 U.S.C. § 1983.[4]

The district court concluded that Ordinance 12, both as written and as enforced after the 1993 "suspension," discriminates against interstate commerce, and so violates the Commerce Clause. The district court granted summary judgment to both sets of plaintiffs. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* 922 F.Supp. 1396, 1405 (D.Minn.1996); *Robinson Rubber Prods. Co. v. Hennepin County,* 927 F.Supp. 343, 346 (D.Minn. 1996). In this consolidated appeal, the County argues that the Tax Injunction Act, 28 U.S.C. § 1341, deprives the federal courts of jurisdiction to enjoin Ordinance 12, that

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[4] Plaintiffs also alleged that the County's enforcement of the Ordinance violates their right to substantive due process and violates federal antitrust laws. These claims are not at issue in this appeal.

all plaintiffs lack standing, and that the Ordinance does not violate the Commerce Clause.

II. DISCUSSION

A. Standing

The County maintains that both the hauler/landfill plaintiffs and the waste generator plaintiffs lack standing to bring this action. The district court found that both sets of plaintiffs have standing.

Standing is the constitutional requirement, imposed by the "cases or controversies" provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 2135-36, 119 L.Ed.2d 351 (1992). To establish standing, a plaintiff must demonstrate three minimal constitutional requirements: (1) an "injury in fact" that is both (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's conduct; that is, that the injury is "fairly traceable" to the challenged action; and (3) that it is likely that a favorable decision will redress the injury. *Id.* at 560-61, 112 S.Ct. at 2136-37.

Even if a plaintiff meets the minimal constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction. These prudential limits are judicially imposed and "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Bennett v. Spear*, —— U.S. ——, ——, 117 S.Ct. 1154, 1161, 137 L.Ed.2d 281 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975)). Two prudential limits are relevant to this case. First, only in exceptional cases may a party have standing to assert the rights of another. *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. This "third-party standing" rule thus "normally bars litigants

from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Id.* at 509, 95 S.Ct. at 2210. In addition, plaintiffs alleging a violation of a constitutional or statutory right must demonstrate that they are within the "zone of interests" of the particular provision invoked. *Bennett*, —— U.S. at ——, 117 S.Ct. at 1161. To satisfy this prudential requirement, a plaintiff must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *see also Bennett*, —— U.S. at ——, 117 S.Ct. at 1161.

There is no question that the *Oehrleins* plaintiffs, that is, various waste haulers and processors, have standing. Ordinance 12 prohibits haulers from delivering designated waste to non-designated facilities. Haulers who violate the Ordinance are subject to a wide variety of sanctions. The record is undisputed that the County has, in fact, subjected various haulers, including some of the hauler plaintiffs, to such penalties. Haulers subject to the Ordinance thus have suffered an actual or imminent injury in fact. Furthermore, the Ordinance harms processors such as the landfill plaintiffs who wish to participate in the market for Hennepin County waste by prohibiting access to that waste. The processor plaintiffs have therefore also alleged a sufficient injury in fact. These injuries are directly traceable to the County's enactment and enforcement of Ordinance 12, and a decision holding the Ordinance unconstitutional would redress those injuries, both by clearing the way for recovery of damages and by enjoining further enforcement. Finally, we see no prudential barriers to standing for the *Oehrleins* plaintiffs.

The class of generator plaintiffs represented by Robinson Rubber presents a more difficult question. The injury these plaintiffs allege is, essentially, that they have been forced to pay higher fees for waste collection, because

haulers have passed on to them HERC's high fees.[5] Insofar as the generator plaintiffs seek relief for the passed-on costs of the County's higher disposal fees, their alleged injury is the indirect result of the County's regulation of the haulers.[6] "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562, 112 S.Ct. at 2137 (citations omitted).

We conclude nonetheless that this indirect economic injury constitutes an injury in fact. Faced with high tipping fees at the HERC incinerator, and prevented from seeking more competitive rates elsewhere, haulers responded, naturally enough, by charging their customers more. This economic burden on customers is concrete, particularized, and actual, and is in no way hypothetical or conjectual. *Cf. Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1387 (8th Cir.1993) (financial burden from flow control ordinance rests in part on waste generators). This burden may be indirect, but it is neither speculative nor merely incidental.

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[5] The County's original tipping fee at interim facilities, before the HERC plant began operating, was $75 per ton. The County raised the rate to $95 per ton in 1990. In contrast, an October 1990 report by the Metropolitan Council indicates that tipping fees at regional landfills ranged from $25 to $60 per ton during fiscal year 1990. Tipping fees at metropolitan landfills averaged $52.60 per ton, while fees at non-metropolitan landfills averaged $40 per ton. In 1994, the County reduced tipping fees at designated facilities to $60 per ton, but also enacted a surcharge on County waste.

[6] The generators argue that Ordinance 12 directly regulates them because "persons" subject to penalty for disposal of designated waste in non-designated facilities include "an individual, business, . . . [or] *generator*." Appellant's Appendix at 141 (emphasis added). The generator plaintiffs did not allege in their complaint, however, that they have been directly harmed by enforcement of the Ordinance against them. Their sole allegation of injury and claim for relief is that they have incurred increased costs because of enforcement of the designation requirements against haulers.

Furthermore, there is little question that these rate increases are fairly traceable to Ordinance 12's restrictions on waste haulers. The County does not dispute that haulers pay significantly higher tipping fees under the designation plan than they would pay at otherwise available landfills. Indeed, the County fully anticipated that designation would result in consumers paying higher disposal fees.[7] Finally, the generators' injuries can be effectively redressed by the remedies they seek: damages for the allegedly unconstitutional restrictions and injunction of continued enforcement. We thus hold that the generator plaintiffs satisfy Article III's "irreducible constitutional minimum" requisites for standing. *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136.

Whether the generator plaintiffs can satisfy prudential limitations on standing is a different question. We are aware of no Commerce Clause case in which the court has granted standing to a plaintiff who was a consumer whose alleged harm was the passed-on cost incurred by the directly regulated party. Indeed, while we continue to use the parties' shorthand term "waste generators" for the *Robinson Rubber* plaintiffs, this term somewhat confuses these plaintiffs' actual role: they are consumers of waste disposal services supplied by garbage haulers such as some of the *Oehrleins* plaintiffs. This kind of "consumer standing" in Commerce Clause cases has not been squarely considered by the Supreme Court.

The generator plaintiffs rely in part on the Supreme Court's recent opinion in *General Motors Corp. v. Tracy*, —— U.S. ——, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997).

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[7] The designation plan the County submitted to the Metropolitan Council stated that "tipping fees would have to be passed on by haulers to their customers. . . . [T]ipping fees [at designated facilities] will probably still be higher than fees for disposal at existing landfills. This will result in haulers having to charge higher rates for customers within Hennepin County than they would charge to similar customers in neighboring counties." *Reprinted in* Appellant's App. at 206.

In *Tracy*, Ohio imposed sales and use taxes on purchases of natural gas from all entities, whether in-state or out-of-state. However, the state exempted from taxation gas purchased from sources that met a statutory definition of "natural gas companies." The definition of "natural gas companes," however, was effectively limited to in-state entities. As a result, the taxes were imposed only on gas purchased directly from out-of-state companies. *Id.* at ——, 117 S.Ct. at 816. General Motors, which purchased nearly all of its natural gas from out-of-state suppliers, brought suit, claiming that the tax was discriminatory and thus violated the Commerce Clause.

The Court held that General Motors had standing, even though it was an in-state firm and the discrimination of which it complained was based on the out-of-state situs of its suppliers. *Id.* at ——, 117 S.Ct. at 818. The Court relied in part on its decision in *Bacchus Imports v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). In *Bacchus Imports*, in-state liquor wholesalers had standing to challenge a discriminatory tax on imported liquor; much as in *Tracy*, the discrimination was based not on the plaintiffs status, but on where the purchased goods originated. *Id.* at 267, 104 S.Ct. at 3053.

The Court's recent decision in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, —— U.S. ——, 117 S.Ct. 1590, —— L.Ed.2d —— (1997), while not directly addressing standing, presents a similar scenario. In *Camps*, the Court considered a Maine tax statute that exempted charitable institutions from real estate and property taxes. Under the statute, however, charities that principally benefited nonresidents of the state were entitled to only a limited tax exemption. The plaintiff, a nonprofit corporation, ran a youth camp in Maine. Ninety-five percent of the young people who visited the camp came from outside the state, rendering the camp ineligible for the full tax exemption. The Court held that the exemption facially discriminated against interstate commerce because it "expressly distinguishes between entities that serve a

principally interstate clientele and those that primarily serve an intrastate market." *Id.* at ——, 117 S.Ct. at 1598.

These cases, however, do not stand for the proposition that consumers paying the end-line cost of an economic regulation have standing to challenge the regulation under the Commerce Clause. In *Tracy, Bacchus Imports,* and *Camps,* the plaintiffs were not alleging that they incurred a passed-on cost; rather, the plaintiffs—not the out-of-state entities—were directly assessed the challenged taxes. Furthermore, the plaintiffs in those cases were, in fact, directly subject to discrimination: they were liable for taxes based on where they purchased goods or (in the case of *Camps*) the nonresident status of their customers. The plaintiffs' Commerce Clause challenges sought to protect their own rights to purchase goods or do business across state borders, without being subject to a discriminatory tax.

The rights vindicated in *Tracy, Bacchus Imports,* and *Camps* are, in fact, comparable to the rights asserted by the hauler plaintiffs in this case. As in those cases, the hauler plaintiffs are directly subject to extra costs (as well as criminal charges, fines, and other penalties) based on where they choose to do business. The generator plaintiff can claim no comparable injury. The injury the generator plaintiffs assert is, rather, comparable to GM truck purchasers claiming a Commerce Clause injury because they must pay more for vehicles because of GM's increased energy costs. Likewise, the comparable plaintiff in *Bacchus Imports* would be consumers disgruntled because they were required to pay more for imported liquor.[8]

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[8] In this respect, *Camps* presents a slightly different situation. In that case, the consumers—that is, the campers—were themselves purchasing services across state borders, and coming into Maine temporarily in order to make use of those services. They were thus unlike the generator plaintiffs in this case, who are state residents dealing with in-state waste haulers.

In our view, the generator plaintiffs' claims fall within the third-party standing doctrine described in *Warth*. In *Warth*, a number of individuals and organizations challenged city zoning ordinances that allegedly barred private development of low income housing. One group of plaintiffs were city residents who alleged that they suffered "economic injury consequent to [the city's] allegedly discriminatory and exclusionary zoning practices." *Warth*, 422 U.S. at 508, 95 S.Ct. at 2210. The Court held that these plaintiffs' claims fell "squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Id.* at 509, 95 S.Ct. at 2210.

The injury claimed by the generator plaintiffs is of the same sort: higher garbage bills due to the passed-on costs incurred by the haulers under the Ordinance. The generator plaintiffs' alleged injury is the economic consequence of the County's restriction of where haulers may deliver waste. The generator plaintiffs cannot claim any personal right under the Commerce Clause to lower garbage bills. Any relief due the generator plaintiffs turns on the rights of the *haulers* to be free of the Ordinance's designation requirements.

We hold, therefore, that the generator plaintiffs are seeking to assert the contitutional rights of the hauler plaintiffs, and the third-party standing doctrine applies. We do not see any reason to relax this prudential bar in this case. While the haulers and generators have an "incidental congruity of interest" in seeing the Ordinance invalidated, they have no special relationship that warrants allowing the generators to assert the rights of the haulers. *Id.* at 510, 95 S.Ct. at 2211. The generators' status as purchasers of disposal services does not constitute such a relationship. If such were the case, then end-line consumers could always assert the Commerce Clause claims of the businesses from whom they purchase goods or services. Furthermore, there is no indication

that allowing standing to the generators "is necessary to insure protection of the rights asserted." *Id.* That the hauler plaintiffs brought suit more than a year before the generator plaintiffs (and indeed share the same counsel) and have aggressively litigated their own claims demonstrates that they are fully capable of asserting their own rights.

We also conclude that the generator plaintiffs lack standing because they are not within the "zone of interests" of the Commerce Clause. The zone of interests doctrine requires that " 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Bennett*, —— U.S. at ——, 117 S.Ct. at 1161 (quoting *Camp*, 397 U.S. at 153, 90 S.Ct. at 829). The Ninth Circuit recently held that individual waste generators lacked standing to bring a Commerce Clause challenge to a county ordinance that required residents to either contract with a designated trash hauler or to dispose of waste at certain designated facilities. *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703-04 (9th Cir. 1997). The court in *Washoe County* held that the plaintiffs satisfied the constitutional minimal standing requirements, but that their asserted injury, having to pay for unwanted garbage services, was "not even marginally related to the purposes underlying the dormant Commerce Clause." *Id.* at 703.

Although the *Washoe County* ordinance differed somewhat from the regulation at issue in this case, the generator plaintiffs here are asserting a similar interest. We agree with the Ninth Circuit that this interest is not one protected by the Commerce Clause. The Commerce Clause is intended to prevent economic protectionism and retaliation betwen states and to allow markets to flourish across state borders, thus prohibiting "laws that would excite . . . jealousies and retaliatory measures" between states. *Carbone*, 511 U.S. at 390, 114 S.Ct. at 1682. The harm alleged by the generator plaintiffs is narrow,

personal, and strictly local: residents of Hennepin County have to pay relatively high bills for the disposal of their garbage. It is unlikely that South Dakota or Iowa are much concerned with what these plaintiffs pay for trash service, much less that high garbage bills in Minneapolis are likely to cause "jealousies and retaliatory measures" in other states. Local consumers shouldering the end-line burden of a purely local regulation are not within the zone of interests of the Commerce Clause. Again, if the ultimate cost of economic regulation to consumers were within the zone of interests of the Commerce Clause, then every consumer could properly challenge such regulations. We decline to expand the scope of claims cognizable under the Commerce Clause this far.

Because we find that the plaintiff waste generators in the *Robinson Rubber* case are asserting the third-party rights of haulers to be free of regulation and because their alleged injury is not within the zone of interests protected by the Commerce Clause, we hold that prudential considerations bar them from maintaining this action.[9]

B. Tax Injunction Act

The Tax Injunction Act, 28 U.S.C. § 1341, provides that the federal courts "shall not enjoin, suspend or restrain the assessment, levy or collection or any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The district court correctly rejected the County's contention that the Act

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[9] We are mindful that granting standing to consumers bearing passed-on costs in Commerce Clause cases could have serious repercussions on state and local governments' ability to enact economic regulations. This is because they would risk enormous liability if such regulation is later invalidated. Here, for example, the waste generator plaintiffs' damage claims exceed $100 million. Especially in the current context, where the limits of local authority to regulate waste streams are still unclear, such risks presents a heavy burden to good faith efforts to enact valid laws intended to further important local goals.

rendered the court without jurisdiction to enjoin enforcement of Ordinance 12.[10]

Whether Ordinance 12 constitutes a "tax" for purposes of the Tax Injunction Act is a question of federal law, and we need not defer to the County's characterization of the Ordinance. *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir.1987). The Ordinance obviously raises revenues by way of the tipping fees charged by the HERC facility. This does not, however, render the Ordinance a tax. The Ordinance's primary purpose is clearly regulatory, rather than revenue-raising. *See Government Suppliers Consolidating Services v. Bayh*, 975 F.2d 1267, 1271 n.2 (7th Cir.1992) (fees generated by a flow control ordinance do not come within the Tax Injunction Act).

Furthermore, the plaintiffs do not question the County's authority to levy taxes. Rather, they challenge the County's regulation of their ability to deliver waste to the facilities of their choice. While the relief they seek may well affect the revenue that the County raises from the designated facilities, this secondary economic effect would not require the court to enjoin, suspend, or restrain any tax collection. *Cf. Harvey & Harvey v. Delaware Solid Waste Auth.*, 600 F.Supp. 1369, 1375-76 (D.Del.1985). Finally, we note that the County's argument would apply to the similar challenge to a flow control ordinance in *Carbone*, yet the Supreme Court in that case did not even question federal jurisdiction in striking the ordinance. We conclude that the Tax Injunction Act does not bar federal jurisdiction in this matter.

C. Commerce Clause

The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce

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[10] Plaintiffs also sought to enjoin the application of County Ordinance 15, which imposed a solid waste management fee on all waste generators in the County. The district court concluded that Ordinance 15 was a tax for purposes of the Tax Injunction Act, and dismissed that portion of the complaint for lack of jurisdiction. Plaintiffs have not appealed this order.

. . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has long held that this grant of power to Congress contains negative implications that restrict states' power to regulate interstate commerce. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87, 107 S.Ct. 1637, 1648-49, 95 L.Ed.2d 67 (1987). Under this "dormant Commerce Clause" jurisprudence, state laws that regulate commerce are subject to a two-step inquiry.

First, if a state law discriminates against interstate commerce "in favor of local business or investment," it is "per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392, 114 S.Ct. at 1683. "Discrimination" for purposes of the Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994); *see also Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir.1995). A state law may discriminate against interstate commerce on its face, in its purpose, or in its effect. *SDDS, Inc.*, 47 F.3d at 267.

Second, if a state law does not overtly discriminate against interstate commerce, it may nonetheless be contrary to the Commerce Clause if it unduly burdens interstate commerce. *Id.* at 268. A non-discriminatory state law, however, is subject to a less rigorous balancing test. Such a law "will be upheld unless the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970).

In this case, the district court held that Ordinance 12, as written, discriminates against interstate commerce. In addition, the court held that the County's suspension of

enforcement against haulers taking waste to out-of-state facilities did not save the Ordinance. Rather, the court found that Ordinance 12 "as enforced" after the County's suspension of enforcement against waste bound out-of-state still discriminated against interstate commerce. The district court thus found both aspects of the Ordinance invalid per se, and did not reach the *Pike* balancing test.

We agree with the district court that the County's partial suspension of enformement puts this case "in a somewhat unusual posture." *Oehrleins,* 922 F.Supp. at 1403. We first note that we know of no authority for the proposition that a law that is facially invalid under the Commerce Clause may nonetheless be upheld "as enforced." Accordingly, we find the analytical framework used by the parties to argue this case somewhat awkward. The validity of the County's limited enforcement of the Ordinance to waste destined for in-state disposal is an important question, however, since plaintiffs seek section 1983 damages for that enforcement.

As for the validity of the Ordinance in its current form, however, we can easily distinguish between interstate and intrastate enforcement. In the 1993 resolution that directed the suspension of enforcement, the County also amended the Ordinance itself. That amendment bifurcated the Ordinance's definition of "designated waste," so that "designated waste" is waste bound for disposal within the state *and* waste bound for delivery out-of-state.[11] The new definition provides an obvious way to

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[11] The current definition is as follows:

"Designated Waste"

A. is mixed municipal solid waste generated in the County and destined for in-state disposal, excluding hazardous waste, infectious waste, and undesignatable waste; and

B. is mixed municipal solid waste generated in the County and destined for out-of-state disposal excluding hazardous waste, infectious waste, and undesignatable waste.

Reprinted in Appellant's App. at 141. The 1993 amendment of the definition appears to have been prompted by concerns that, while

separately consider whether purely intrastate enforcement of the Ordinance is different from full enforcement. That is, if intrastate enforcement is permissible under the Commerce Clause but interstate enforcement is not, we may sever the offending half of the definition of "designated waste." We therefore separately consider these two aspects of Ordinance 12.

1. Restrictions on Waste Destined for Out-of-State Shipment.

Access to the market for waste processing, including this type of "flow control" ordinance, implicates the dormant Commerce Clause. *Carbone*, 511 U.S. at 389, 114 S.Ct. at 1681; *Waste Sys. Corp.*, 985 F.2d at 1386. In *Carbone*, the Supreme Court considered a local flow control ordinance that required all local waste to be processed at a single designated facility. The Court held that because the ordinance effectively prohibited export of waste beyond state lines without the initial local processing, it discriminated against interstate commerce. This was so even though the ordinance restricted waste transfer within the state as well. *Carbone*, 511 U.S. at 390-91, 114 S.Ct. at 1682-83. *See also Waste Sys. Corp.*, 985 F.2d at 1386-89 (holding that a similar designation ordinance applied to all county waste violated the Commerce Clause). *Carbone* and *Waste Systems* squarely foreclose the County's argument that Ordinance 12 is "even-handed" and nondiscriminatory because it limits interstate exports no more than intrastate transfer. To the extent that Ordinance 12 prohibits export of waste across state lines, it is irrelevant that the Ordinance also restricts garbage movement within the state.

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designation may have been constitutional with regard to waste staying in Minnesota, enforcement against waste bound for delivery out-of-state would be found impermissible. *See* Memorandum from Pat Diamond, Deputy County Attorney, *reprinted in* Appellees' App. at 63. The bifurcated definition was, in fact, intended to facilitate severability in the case of an adverse court ruling on interstate designation. *Id.*

The County argues that Ordinance 12 is different from the flow control ordinances in the above cases. *Carbone* involved a local ordinance that, without exception, directed all local waste to a single in-town transfer station. 511 U.S. at 387, 114 S.Ct. at 1680-81. The ordinances invalidated in *Waste Systems* also mandated deposit in a county composting facility, and provided for limited exclusions upon petition. However, one of the criteria for exclusion was that any exclusion could not undermine the financial viability of the county facility. *Waste Sys. Corp.*, 985 F.2d at 1386. In light of this, the court determined that the exclusion promise was "illusory" and that the ordinances "in practice, entirely forbid transport of waste out of the Counties." *Id.* at 1387.

Ordinance 12, however, exempts all pre-1985 facilities from designation. It also provides for the designation of additional facilities and for an exclusion process. Furthermore, there is evidence that the County has granted some exclusions to non-designated facilities. It is more difficult to simply label the exclusion process here as "illusory." Relying on a Third Circuit case, the County argues that because exclusions are granted based on neutral, nondiscriminatory criteria, the Ordinance is even-handed with respect to interstate commerce. *See Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 802 (3d Cir. 1995) (stating in *dicta* that open bidding and a fair selection process may not violate Commerce Clause, even if it results in exclusive designation of an in-state facility).

We need not decide the validity of this premise, however, because even if we were to agree with the *Harvey* dicta it would not save Ordinance 12 from rigorous scrutiny. The initial designation here simply was not "open." Ordinance 12 was enacted, in part, specifically to insure an adequate waste supply for a certain designated facility: the HERC incinerator. Indeed, the HERC plant was the only disposal facility the Ordinance initially designated, and the interim transfer stations were to accept

designated waste for ultimate disposal at HERC. The possibility of an out-of-state processor obtaining designation or getting a later exclusion simply does not alter the initial immediate purpose and effect of the Ordinance, which was to grant an absolute preference to a particular local interest at the expense of all others. The district court rightly concluded that, as applied to waste destined for transport outside Minnesota, Ordinance 12 discriminates against interstate commerce and is thus subject to rigorous scrutiny. In light of *Carbone* and *Waste Systems* we hold that the interstate enforcement of the Ordinance cannot survive such scrutiny and violates the Commerce Clause.

2. Ordinance 12 as Applied Intrastate

Although the Commerce Clause prevents the County from restricting the flow of waste out-of-state, we must still consider whether the County may enforce flow control restrictions to waste that stays within Minnesota. The district court held that the Ordinance "as enforced" discriminates against interstate commerce and is thus invalid per se.

It is undisputed that the County has completely stopped penalizing haulers for carting waste to out-of-state facilities. We cannot agree with the plaintiffs, however, that the remaining intrastate restriction on the flow of waste also discriminates against interstate commerce. Although the County maintains a monopoly on waste that stays in-state, this does not amount to discrimination because local processors, even the designated facilities are not being treated preferentially with respect to out-of-state facilities. Here, there is no "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. at 1350. The only preference granted to the designated facilities is with respect to other *local* operators. This may create a monopoly at the local level, but as long as waste is allowed to flow freely in or out of the state,

this does not constitute discrimination against interstate commerce.

Indeed, Ordinance 12 as enforced would seem to confer an economic benefit, not burden, to out-of-state interests. Out-of-state landfills or other processing facilities are not barred from receiving Hennepin County waste. Furthermore, out-of-state processors are apparently able to charge tipping fees substantially less than those charged by the County. The *Oehrleins* plaintiffs stated in their pleadings, and again in their brief on appeal, that haulers in fact began to deliver waste to out-of-state processors as a response to the County's suspension of interstate enforcement in 1993. Encouraging delivery of County waste out-of-state imposes a burden only upon local concerns—including designated facilities—to the benefit of out-of-state facilities. This may be economically distorting, but purely local monopolies or market controls that inure to the benefit of out-of-state concerns simply do not constitute "discrimination" under the Commerce Clause.

The plaintiffs argue, and the district court agreed, that intrastate flow control is nonetheless discriminatory. Relying on *Carbone* and *Waste Systems*, the plaintiffs argue that the Ordinance is discriminatory because it is solely a kind of "economic protectionism" that the Commerce Clause is intended to prevent. But as *Carbone* itself explains, "the central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." 511 U.S. at 390, 114 S.Ct. at 1682. A purely intrastate flow control regulation may well be "protectionist," but it is only so at the local level. When local facilities are competitively disadvantaged by a regulation that restricts their access to the market while out-of-state entities bear no such burden, there is little risk of inciting "jealousies and retaliatory measures" from neighboring states.

The district also concluded that Ordinance 12 discriminates in effect by impeding long-term contracts with out-of-state processors because of the threat that the County might, in the future, resume full enforcement, and that this was indeed the County's purpose. We cannot agree. The plaintiffs have produced no evidence that the Ordinance has had such an effect, nor is there any evidence that the County intended the Ordinance to have such an effect. It is beyond dispute that the 1993 suspension of interstate enforcement allowed waste to flow freely to out-of-state processors, while working a comparative disadvantage to local entities. This hardly shows a purpose to discriminate against out-of-state concerns.[12]

The district court also reasoned that the Ordinance "as enforced" discriminates in effect by denying out-of-state concerns the ability to compete for local waste. To use

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[12] In trying to show a discriminatory purpose, the plaintiffs put much weight on a memorandum from a deputy county attorney concerning the 1993 amendments to the ordinance and suspension of interstate enforcement. In this memorandum, the deputy county attorney states that the amendments and "a letter suspending he enforcement of designated waste destined for disposal outside the state of Minnesota, would put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time." *Reprinted in* Appellees' App. at 63. Even if we were to impute the deputy county attorney's opinion to the County, we do not find this language as sinister as plaintiffs suggest. In our view, the memorandum merely reflects that, given the uncertainty of the law at the time, neither the County nor the waste haulers could anticipate what aspects of Ordinance 12 might ultimately be found valid or invalid. (At the time, the Supreme Court's decision in *Carbone* was pending. Indeed, the letter the County sent to haulers notifying them of the suspension of enforcement makes express reference to the uncertainty of the legal validity of flow control ordinances, and to the pending Carbone decision. Appellant's App. at 156.) Furthermore, even were we to credit the plaintiffs' assertion that the possibility of continued full enforcement of the Ordinance impedes out-of-state contracting, this threat simply evaporates given our holding that such enforcement would violate the Commerce.

the district court's example, "[a]n out-of-state concern which built a state-of-the-art processing facility in the middle of Hennepin County could not lawfully receive any waste from the County." *Oehrleins,* 922 F.Supp. at 1404. Thus, the district court concluded, Ordinance 12 discriminates against interstate commerce by prohibiting out-of-state entities full access to the local market in waste processing.

In reaching this conclusion, the district court relied on *Carbone* and *Dean Milk Co. v. Madison,,* 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), for the proposition that Ordinance 12 discriminates by prohibiting the "importation of waste processing services." *Oehrleins,* 922 F.Supp. at 1404. But the ordinance in *Carbone* subjected all waste, including waste bound out-of-state, to the local processing requirement. Out-of-state processors were thus "deprive[d] . . .of access to a local market." 511 U.S. at 389, 114 S.Ct. at 1681. Such is not the case here. *Dean Milk* invalidated a county ordinance that prohibited the sale in Madison, Wisconsin, of milk pasteurized outside of city boundaries. 340 U.S. at 350, 71 S.Ct. at 296. Milk pasteurized at facilities in different states was thus completely cut out of the local market. Again, Ordinance 12 has no such effect. Quite to the contrary, it is undisputed that after the 1993 "suspension," out-of-state processors were permitted to and did, in fact, participate in the market for County waste by receiving waste.

This "market access" theory also assumes that an out-of-state concern that permanently locates an operation within the state is still an "out-of-state" entity that can complain that a law that even-handedly restricts a local market is "discriminatory." The plaintiffs offer no authority for this position. A Delaware corporation doing busines in Minnesota could not argue that it is discriminated against by Minnesota laws that apply equally to all businesses operating in the state. South Dakota companies

may choose not to locate operations in Minnesota because of comparatively high state taxes that apply to all businesses, but this is not discrimination under the Commerce Clause.[13] Like any other local market regulation, Ordinance 12 may or may not encourage companies from doing business in the state. But while this may be a relevant concern in forming economic policies, it is simply not the proper inquiry for considering discrimination under the Commerce Clause. *Cf. CTS Corp.*, 481 U.S. at 93-94, 107 S.Ct. at 1651-52 (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127, 98 S.Ct. 2207, 2214-15, 57 L.Ed.2d 91 (1978)) ("We have rejected the 'notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market."). Plaintiffs' analysis would render virtually all local economic regulations "discriminatory" and subject them to "per se" invalidation. This would vastly expand the implications of the dormant Commerce Clause, and we decline to follow such a course.

The plaintiffs argue that "interstate commerce" means more than "goods crossing state lines." This proposition is undoubtedly correct: even a non-discriminatory law may unconstitutionally burden interstate commerce. But if so, this is because that regulation fails the less rigorous balancing test of *Pike*, not because it is subject to rigorous scrutiny and virtually "per se invalidation." Restrictions on the ability of companies, regardless of state of origin, to process Hennepin County waste *in Minnesota* may be relevant to the Commerce Clause issue; but if so, this goes not to a finding of "discrimination" but to whether the effect of the restriction is to impermissibly burden interstate commerce.[14] As we have stated before, "[n]ega-

[13] It would be a different matter, of course, if the state were to treat a company incorporated or principally located in another state differently from Minnesota companies on that basis.

[14] Accordingly, the plaintiffs' argument that out-of-state companies are effectively prevented from operating waste-to-energy processing

tively affecting interstate commerce is not the same as discriminating against interstate commerce." *Cotto Waxo*, 46 F.3d at 794. In this case, the district court conflated "discrimination" with "effect on commerce" and applied rigorous scrutiny when balancing is called for.

We hold, therefore, that intrastate designation as currently enforced pursuant to Ordinance 12 does not discriminate against interstate commerce, and is thus contrary to the Commerce Clause only if it fails the *Pike* balancing test. Under *Pike*, those portions of Ordinance 12 that apply to waste destined for in-state disposal are only unconstitutional if "the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. Because the district court incorrectly held that the intrastate application of Ordinance 12 was per se invalid, rather than applying the appropriate balancing test, we reverse and remand. We remand to the district court for consideration of whether the burden on interstate commerce clearly exceeds the local benefits. In conducting this review, the district court should consider all of the interests advanced by the Ordinance in the entire context of the County's master plan and designation plan. These include those anticipated benefits outlined in the designation plan, including landfill abatement, County-wide coordination of waste management, the production of energy, resource recovery, and the goals of the Waste Management Act that the Ordinance was intended to advance.[15]

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plants may be relevant to a *Pike* analysis, provided that there is evidence that an interest in developing such facilities actually exists and is frustrated by the Ordinance.

[15] We reject plaintiffs' assertion that the County's goal in enacting Ordinance 12 must be strictly distinguished from the overall interests served by the designation plan, and that the sole goal of Ordinance 12 is to ensure the financial viability of the HERC facility. The Ordinance's preamble and the County resolution adopting the Ordinance make explicit reference to the environmental

III. CONCLUSION

The certified class of consumers of waste disposal services represented by Robinson Rubber Products lacks standing in this Commerce Clause action. In regard to the remaining hauler and processor plaintiffs, we conclude that those provisions of Ordinance 12 that prevent the delivery of Hennepin County solid waste to facilities outside of the state discriminate against interstate commerce and so violate the Commerce Clause of the United States Constitution. Those provisions of the Ordinance, however, that restrict intrastate delivery of waste to non-designated facilities do not discriminate against interstate commerce. We remand to the district court for a determination whether the putative local benefits of the intrastate enforcement of Ordinance 12 are clearly outweighed by the burdens on interstate commerce, and for further proceedings consistent with this opinion.[16]

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interests the Ordinance seeks to advance; the County's designation plan likewise summarizes in great detail various expected benefits of designation. While we may legitimately balance the County's purported interests against the Ordinance's burden on interstate commerce, we have no authority to instruct the County that those stated interests are not really interests. *Waste Sys. Corp.*, 985 F.2d 1381, is not to the contrary. In *Waste Systems*, the court found that the ordinance at issue facially discriminated against interstate commerce, and that the county's overarching environmental goals could not offset that discrimination. *Id.* at 1388. In this case, Ordinance 12 is plainly part of a waste management framework developed over several years, and is inextricably bound up with the County's waste management master plan and designation plan developed pursuant to the Waste Management Act. To lift out of context a statement from *Waste Systems* and argue that "even if the [County] acted out of legitimate environmental concern when constructing the [HERC facility], the purpose of the [facility] is not the same as the purpose of [Ordinance 12]" is to ignore reality. *Id.*

[16] Appellees' motion to strike the briefs of the State of Minnesota as amicus curiae is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MINNESOTA
FOURTH DIVISION

Civ. No. 4-94-63

BEN OEHRLEINS AND SONS AND DAUGHTER, INC, n/k/a DAKOTA RESOURCE RECOVERY, INC.; DICK'S SANITATION; ELK RIVER LANDFILL, INC.; GALLAGHER'S SERVICE, INC.; KNUTSON SERVICES, INC.; RANDY'S SANITATION, INC.; POOR RICHARD'S, INC.; VASKO RUBBISH REMOVAL, INC.; WASTECO, INC.; WASTE SYSTEMS CORP.; AND WALTERS RECYCLING & REFUSE SERVICE,
Plaintiffs,

v.

HENNEPIN COUNTY, MINNESOTA,
Defendant.

March 28, 1996

ORDER

DOTY, District Judge.

This matter is before the court on plaintiffs' motion for partial summary judgment and defendant's motion to dismiss. Based on a review of the file, record and proceedings herein, and for the reasons stated, the court grants plaintiff's motion for partial summary judgment and grants in part and denies in part defendant's motion to dismiss.

BACKGROUND

Many of the essential facts may be found in the court's prior order denying defendant's motion to dismiss, reported at 867 F.Supp. 1430 (D.Minn.1994). In response to the Minnesota Waste Management Act, Minn. Stat. § 115A.02, *et seq.*, Hennepin County ("the County") enacted Ordinance 12. Ordinance 12 is a waste flow-control regulation which, consistent with the Act and widespread practice, reflects the hierarchy of waste disposal methods. Processing is considered to be environmentally superior to landfilling. Ordinance 12, as written, requires that all "Designated Waste" generated within Hennepin County shall be delivered to a "Designated Facility." The County, in implementing the ordinance, did not have to look far for a facility to designate. In the mid-1980s, the County issued approximately $150,000,000 in bonds for the construction of a "mass burn" facility which cost $129,000,000 to build. To date, only this facility (known as "HERC") and one other have been designated by the County. This designation permitted the County to charge a fee substantially higher than that charged by other waste disposal facilities.

Plaintiffs in the present action are haulers and processors of waste. They allege that Ordinance 12 discriminated against interstate commerce because, as written, it does not permit County waste to be disposed out-of-state. In late 1993, the County suspended, "until further notice," enforcement of Ordinance 12 with respect to waste destined for out-of-state disposal. As a result, there is also presented the issue of the ordinance's constitutionality "as enforced."

DISCUSSION

1. Defendant's Motion to Dismiss

A. Standard of Review

A motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Scheuer v. Rhodes*, 416

U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). When analyzing a motion to dismiss, the court looks to the complaint as pleaded. The complaint must be liberally construed and viewed in the light most favorable to the plaintiff. The court will dismiss a complaint only when it appears the plaintiff cannot prove any set of facts that supports the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

B. The Tax Injunction Act

Defendant's motion to dismiss has three grounds. First, the County argues that the court lacks jurisdiction to entertain plaintiffs' challenge to Ordinance 12 because the ordinance, as characterized by plaintiffs, constitutes a "tax". The Tax Injunction Act provides that:

> The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of that state.

28 U.S.C. § 1341. This prohibition extends to suits for injunctive relief and to section 1983 claims in which a plaintiff seeks an injunction. *Burris v. City of Little Rock*, 941 F.2d 717, 720 (8th Cir.1991).

An essential predicate for invoking this defense is a determination that Ordinance 12 constitutes a tax. Whether it does so is a question of federal law, and this court need not defer to the label given by the County. *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir.1987). The County does not argue that Ordinance 12 is a tax, rather the County suggests that plaintiffs characterize the fee-generating aspects of Ordinance 12 as a funding measure and thus a "tax'. This position can perhaps be traced to the County's reliance on *Indiana Waste Systems v. County of Porter*, 787 F.Supp. 859, 865 (N.D.Ind. 1992). *Indiana Waste Systems* involved a $0.20 fee

levied on each cubic yard of waste disposed of at plaintiff's landfill. In considering a Tax Injunction Act defense to the plaintiff's suit, the court stated that "IWS agrees that the fee is a tax by stating [in its complaint] '[n]o statute grants Porter County the express authority to impose a tax such as the one contemplated by Section V of the Ordinance' ". *Id.*

Hennepin County's reliance on this case is misplaced. In determining whether Ordinance 12 is a tax the court must look toward the purpose underlying the ordinance. If it is primarily a revenue-raising measure, then it may be considered a tax. *Marigold Foods v. Redalen*, 809 F.Supp. 714, 719 (D.Minn.1992). On the other hand, if it is primarily regulatory or punitive in nature, then it is not a tax. *Id.; see also American Petrofina Co. of Texas v. Nance*, 859 F.2d 840, 841 (10th Cir.1988) ("the mere fact that a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised").

Ordinance 12 clearly raises revenue. However, the "tipping fee" which the County has been able to charge is not the primary feature of the ordinance. Rather, the ordinance regulates the flow of waste originating in Hennepin County. The revenue raised, while undeniably significant, is incident to the requirement that waste must go to the County's designated facilities. As it is not a tax, the court is not precluded from considering the constitutionality of Ordinance 12.

C. Collateral Estoppel

The County argues that Count II of the complaint, which alleges that the County arbitrarily and capriciously enforced Ordinance 12 despite knowing of its unconstitutionality, must also be dismissed. On March 20, 1995, a discover order was issued in the companion state-court litigation which arose following this court's dismissal of

plaintiffs' related claims.[1] The discovery order rejected plaintiffs' claim that certain putative work-product generated by the County was subject to the crime-fraud exception to the work-product doctrine. The order states:

> Plaintiffs have at most established that [the County] was aware of potential constitutional problems with Ordinance 12. This awareness, however, is not enough to establish that [the County's] continued enforcement of that ordinance was in violation of the law. Accordingly, the Court denies Plaintiffs [sic] motion as said motion relates to [the crime fraud exception].

Oehrleins v. Hennepin County, No. 94-12549, at 8 n. 4 (Hennepin Cty. Dist.Ct. Mar. 20, 1995). The County argues that this statement collaterally estops the plaintiffs from proceeding under Count II. The court disagrees.

Collateral estoppel requires, *inter alia*, the existence of a valid, final judgment and an identity between the issue decided and the one for which preclusion is sought. Restatement (Second) of Judgments, § 27. The County has demonstrated neither of these. First, a discovery order is not a final judgment. Further, plaintiffs are not seeking in Count II a determination that the County is guilty of criminal or fraudulent conduct. Plaintiffs' substantive due process claim is a constitutional tort, the merits of which are not implicated by an order denying discovery based on the crime-fraud exception to the work-product doctrine. Defendant's motion to dismiss Count II based on collateral estoppel is therefore denied.

D. Minnesota Constitution

Finally, the County argues that Count V, which articulates a violation of due process rights secured by Article

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[1] By order dated June 21, 1994, the court dismissed plaintiffs' challenge to Ordinance 15 which imposed a waste-generation fee on Hennepin County waste. This dismissal was predicated upon the Tax Injunction Act and resulted in plaintiffs litigating Ordinance 15 in state court.

I, § 7 of the Minnesota Constitution, fails to state a claim. Paragraph 83 of the complaint states that "Ordinance 12 impermissibly interferes with intrastate commerce in violation of the Minnesota due process clause." Paragraph 3 under plaintiffs' prayer for relief requests damages as a result of this violation.

The court agrees that this count fails to state a claim. Minnesota does not recognize a damage remedy for violations of Art. I, § 7 of the Minnesota Constitution. *Bird v. State Dept. of Public Safety,* 375 N.W.2d 36, 40 (Minn.Ct.App.1985). Moreover, the basis of plaintiffs' claim, restriction of intrastate commerce, was rejected in *Waste Systems Corp. v. County of Martin,* 784 F.Supp. 641 (D.Minn.1992). In *Waste Systems,* the court noted that, although the Minnesota Supreme Court held in 1975 that intrastate restrictions were invalid, this holding was legislatively overturned by Minn.Stat. § 115A.80, *et seq.* which explicity authorized such restrictions. *Waste Systems,* 784 F.Supp. at 647. Accordingly, this claim is dismissed with prejudice.

E. Walters Recycling

Consistent with the court's prior order, 867 F.Supp. at 1435-1436, Count IV of the complaint (Sherman Act) is dismissed with respect to plaintiff Walters Recycling, a party added by the April 5, 1995, order of Magistrate Judge Lebedoff.

II. Plaintiffs' Motion for Partial Summary Judgment

A. Standard of Review

The court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). This standard mirrors the standard for judgment as a matter of law under Federal

Rule of Civil Procedure 50(a), which requires the trial court to enter judgment as a matter of law if there can be but one reasonable conclusion as to the verdict. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249, 106 S.Ct. at 2510-11.

On a motion for summary judgment, the court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in its favor. *Id.* at 250, 106 S.Ct. at 2511. The nonmoving party, however, cannot rest upon mere denials or allegations in the pleadings. Nor may the nonmoving party simply argue facts supporting its claim will be developed later or at trial. Rather the nonmoving party must set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. *See Anderson*, 477 U.S. at 250-51,106 S.Ct. at 2511-12. If a plaintiff fails to support an essential element of a claim, however, summary judgment must issue because a complete failure of proof regarding an essential element renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53. With this standard in hand, the court addresses plaintiffs' motion for partial summary judgment.

B. Standing

An initial and persistent contention of the County is that these plaintiffs lack standing to challenge the constitutionality of Ordinance 12. The County notes that since August 1, 1994, state law has prohibited all Minnesota landfills from receiving unprocessed waste generated in the

metropolitan area, which includes Hennepin County waste. Minn.Stat. § 473.848 (1994). Thus, the County argues that no plaintiff could have suffered injury after August 1994, as a result of Ordinance 12. This contention is without merit. Ordinance 12 requires processing at specific facilities. Section 473.848 does not, unlike Ordinance 12, require the use of the County's designated processing facilities prior to landfilling. It simply requires the use of some processing facility prior to disposal in Minnesota.

The County also argues that plaintiffs have not shown that they would have participated in an interstate market absent Ordinance 12. First, such a showing is not necessary. *See Poor Richard's, Inc. v. Ramsey County, Minn.*, 922 F.Supp. 1387, 1391-92 (D.Minn.1996). Moreover, the County's argument is refuted by the undisputed evidence that several plaintiffs did ship waste out-of-state as soon as enforcement was suspended. Several plaintiffs also incurred fines as a result of the enforcement of Ordinance 12. The court finds that plaintiffs have standing to challenge the constitutionality of Ordinance 12.

C. Discrimination Under the Commerce Clause

The Commerce Clause of the United States Constitution provides that "Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause of the Constitution is also understood to have a negative or dormant application which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon*, 511 U.S. 93, —, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994). Thus, the dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988).

The Supreme Court has also recognized, however, the right of states to adopt regulations designed to safeguard the health and safety of its people even though such regulations may incidentally burden interstate commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535-36, 57 L.Ed.2d 475 (1978). The Supreme Court has held that solid waste is an article of commerce and legislation by the states which restricts its movement is subject to constitutional scrutiny. *Id.* at 622-23, 98 S.Ct. at 2534-35.

In a Commerce Clause challenge, the burden is initially on the plaintiff to show that the legislation is discriminating against interstate commerce on its face or in its purpose or effect. *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S.Ct. 1727, 1731, 60 L.Ed.2d 250 (1979). Discrimination for purposes of the Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter." *Oregon Waste*, 511 U.S. at —, 114 S.Ct. at 1350. If a statute discriminates in favor of a local investment, it is *per se* invalid unless the state can prove, "under rigorous scrutiny, that has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, —— U.S. ——, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

1. Ordinance 12 as Written

The County argues that Ordinance 12 and its accompanying designation "permit the free flow of waste." Def's Mem. Opp.Summ.J. at 12 n. 11. The County thus seeks to distinguish Ordinance 12 from the very similar regulation struck down in *Carbone*. That regulation required all waste generated or channeled locally to be shipped to the municipally-built transfer station. Hennepin County's interpretation of the effect of Ordinance 12, however, is inconsistent with the plain language of the ordinance. Where waste may only be shipped to designated facilities, or a very limited number of exempted ones, the flow of

waste is in no sense "free." The County's assertion that existing facilities (both in- and out-of-state) were "grandfathered" in by Ordinance 12 is irrelevant. More recent facilities are no less discriminated against because then-existing facilities were exempted.

Moreover, the ordinance and accompanying designation clearly favor in-state interests over out-of-state ones. In *Carbone,* the municipality argued that all waste, regardless of origin, was subject to processing at the designated facility. The municipality in *Carbone* therefore asserted that there was no discriminatory barrier. Hennepin County's argument, while somewhat confusing, is similar. The County suggests that the distinction drawn in Ordinance 12 concerns processing versus landfilling with a preference for the former. "In effect, Ordinance 12 as written barred the disposal of unprocessed waste only in landfills, both in-state and out-of-state." Def's Mem.Opp.Summ.J. at 12-13. This argument is unhelpful because the County may not prohibit landfilling beyond Minnesota's borders. *Carbone,* —— U.S. at ——, 114 S.Ct. at 1683. Overlooking the obvious inconsistency between the rest of this argument and the County's "force majeure" standing argument regarding Minn. Stat. § 473.848, it is incorrect to suggest that Ordinance 12 does not act with reference to location. The designation which gives effect to the ordinance requires processing at the two County-related facilities.[2]

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[2] The County disputes whether it "owns" HERC. It does not dispute, however, the fact that whatever ownership/management structure may currently exist, the County has an obvious financial interest in the success of its $129,000,000 investment. The court notes that the State of Minnesota apparently thinks that HERC is a county-owned facility. *See* Solid Waste Fee Report, December 1994 ("Hennepin County has contracts with HERC, the county-owned waste-to-energy plant"). The County also does not dispute plaintiffs' claim that it has a financial interest in the NSP facility, though it appears that interest is limited to the County's obligation to provide it with approximately 60,000 tons of waste per year.

In short, "[t]he ordinance is no less discriminatory because in-state . . . processors are also covered by the prohibition." *Carbone*, —— U.S. at ——, 114 S.Ct. at 1682. *Waste Systems Corp. v. County of Martin*, 784 F.Supp. 641 (D.Minn.1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993). Like the regulation in *Carbone*, the ordinance hoards the demand for waste processing (itself an article of commerce) for the benefit of the preferred facilties. It is thus discriminatory and subject to strict scrutiny.[3]

Ordinance 12 may survive strict scrutiny if the County can demonstrate that it had no other means to advance a legitimate local interest. *Carbone*, —— U.S. at ——, 114 S.Ct. at 1683. There can be no dispute, in light of the solid waste crisis which has given rise to much litigation nationwide, that environmentally sound waste disposal is a legitimate governmental objective. The County asserts that there were no alternatives to designation.

The problem with the Country's waste disposal position, however, is that it is based on the premise that the County' efforts must be self-sustaining and financially isolated from general County activities.[4] Designation is, in effect, a financing measure designed to ensure the viability

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[3] In *Harvey & Harvey v. Chester*, 68 F.3d 788, 802-80 (3d Cir. 1995), *cert. denied*, —— U.S. —— 116 S.Ct. 1265, 134 L.Ed.2d 213 (1996), the Third Circuit suggested that a designating municipality might rebut a showing of discrimination with regard to outcome if it could demonstrate neutrality in the selection process. Even if the validity of that precedent is assumed, the County has made no effort to produce the "substantial evidence" required. *Harvey*, 68 F.3d at 803. In light of the fact that the County primarily designated its own facility, this would require a convincing showing of neutrality. Because the County has not advanced this argument, however, the court need not consider whether *Harvey* is applicable.

[4] *See* Exh. Q. to the Affidavit of Charles N. Nauen, at 2 (financial consultant's opinion letter to county reciting criteria for solid waste plan, including "The County views the project as a self-financing, self-supporting enterprise isolated from the county's general operations.")

of the County's investment. This is precisely the sort of purpose which the Supreme Court invalidated in *Carbone:* "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone*, —— U.S. at ——, 114 S.Ct. at 1684. While subsidization of its facility through general taxes may be unattractive to the County, the Supreme Court has specifically endorsed that as a nondiscriminatory alternative for municipalities to secure the long-term survival of environmentally superior waste processing. *Carbone*, —— U.S. at ——, 114 S.Ct. at 1684. The record demonstrates that tax support was never a serious option for the County in light of its stated criteria. The County cannot rely, however, on a discriminatory regulation to compensate for its unwillingness to impose potentially less popular measures.

2. Ordinance 12 as Enforced

This case is in a somewhat unusual posture due to the County's temporary suspension of Ordinance 12 with respect to out-of-state disposal. As the foregoing discussion makes clear, Ordinance 12 is constitutionally infirm as written. Plaintiffs challenge Ordinance 12 on the basis of interstate effects, notwithstanding the limited enforcement. Therefore, the court will also consider the constitutionality of Ordinance 12 as enforced.

The County recycles its standing arguments detailed earlier by arguing that plaintiffs could not have suffered injury due to any restriction on interstate commerce. In response, plaintiffs recite several interstate effects despite the facially intrastate regulation under Ordinance 12 as enforced. First, plaintiffs assert that they are precluded from entering into long-term out-of-state hauling contracts because of the threat that enforcement might resume. This argument is effective as it appears the County had precisely this result in mind. A memorandum sent from the County's internal legal counsel to the county administrator stated:

> [S]uspending the enforcement of designated waste destined for disposal outside the state of Minnesota[] would put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time
>
> . . .
>
> The risk [that the entire Ordinance may be found to be unconstitutional] is, however, probably preferable to suspending enforcement of both in-state and out-of-state disposal, resulting in the County losing the waste altogether, to long-term hauler contracts.

Affidavit of Alexandra B. Klass Exh. 9.[5]

The County might have avoided providing plaintiffs with standing to challenge Ordinance 12 on this basis had it simply chosen to amend Ordinance 12 permanently. Instead, it elected to keep the threat of out-of-state enforcement viable for the apparently express purpose of discouraging interstate commerce. In light of this conclusion, the court considers the ongoing threat of enforcement to constitute part of the actual enforcement of Ordinance 12. This threatened enforcement is discriminatory and without justification.

Plaintiffs also claim that the ordinance discourages out-of-state concerns from competing in Minnesota for the processing of Hennepin County waste. Thus, while the ordinance as written prohibits the exportation of waste for processing, the ordinance as enforced prohibits the importation of waste processing services. The County characterizes the issue somewhat differently, arguing that while Ordinance 12 may favor certain in-state interests over others, it does not implicate the Commerce Clause.

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[5] The county argues that this is privileged work product and/or attorney-client communications. Once disclosed, however, the communication loses its privileged character. Although it strenuously objects to the plaintiffs' use of this document, the County recites no facts or law to justify a finding of non-waiver.

The County directs the court's attention to *Vince Refuse Service, Inc. v. Clark County*, 1995 WL 253121 (S.D.Ohio March 7, 1995), in support of this contention. At issue in *Vince Refuse* was an ordinance aimed at encouraging recycling. It mandated that all recyclable waste had to be routed through the county's chosen facility, the chosen landfill, or be shipped out-of-state. The incentive to recycle was provided by a fee which was charged for each ton of landfilled waste. A hauler bypassing recycling would pay more than it would when recyclables were removed. The district court rejected a Commerce Clause challenge to the ordinance reasoning that while it was discriminatory, such discrimination was only among purely in-state interests:

> To borrow from the Supreme Court in *Hughes* [*v. Oklahoma*, 441 U.S. 322, 325, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979)] the Commerce Clause was intended to prevent economic Balkanization among the states . . . That provision of the Constitution was not intended to prevent economic Balkanization within a state. Herein, the protectionist aspect of the flow control regulations does not curtail the movement of solid waste into or out of Ohio. Therefore, those regulations do not discriminate against interstate commerce; rather the flow control regulations discriminate against intrastate commerce.

Vince Refuse, 1995 WL 253121 at *9.

This analysis, however, fails to recognize the true burden to interstate commerce which designation ordinances effect. Even where out-of-state "safety valves" exist, such ordinances prohibit the importation of waste processing services which are indisputably an article of commerce. *Carbone*, —— U.S. at ——, 114 S.Ct. at 1682. Consequently, the court must consider whether the ordinance hinders the movement of waste processing services as well

as restricts the movement of waste. As the Supreme Court observed:

> The essential vice in laws of this sort is that they bar the import of the processing service . . . In *Dean* [*Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951)] the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out of state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Carbone, —— U.S. at ——, 114 S.Ct. at 1683.

Here, an out-of-state processor simply may not compete in Minnesota for the processing of Hennepin County waste. The distinctions drawn by the ordinance are not, as the County suggests, between in-state and out-of-state landfills; they are between its local, proprietary facilities and all other interests, including out-of-state facilities. Nor does the ordinance simply distinguish between environmentally superior and inferior methods of disposal. An out-of-state concern which built a state-of-the-art processing facility in the middle of Hennepin County could not lawfully receive any waste from the County. This is classic discrimination against interstate commerce. Thus, the County must justify its discrimination, subject to the court's searching scrutiny. As described above, the County has failed to do so. Moreover, consistent with the Supreme Court's analysis in *Carbone*, the conclusion that Ordinance 12 as enforced is discriminatory renders unnecessary any inquiry as to whether it can be justified under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Accordingly, the court holds that Ordinance 12, as written and as enforced, is an invalid attempt to protect local interests (principally, the County's) from interstate com-

petition. Summary judgment on Count I in favor of plaintiffs and against defendant is therefore granted.

D. 42 U.S.C. § 1983

Plaintiffs' Commerce Clause challenge is also predicated upon 42 U.S.C. § 1983.[6] After the Supreme Court's decision in *Dennis v. Higgins*, 498 U.S. 439, 451, 111 S.Ct. 865, 872-73, 112 L.Ed.2d 969 (1991), it is clear that § 1983 supports such claims. Liability is evident as a result of the foregoing discussion. The amount of damages, however, remains disputed by Hennepin County. Thus, the court grants plaintiffs' motion for partial summary judgment on Count III based on liability and denies it as to damages.

Plaintiffs also move for attorneys fees pursuant to 42 U.S.C. § 1988. As a prevailing party, plaintiffs are entitled to attorneys fees. The court defers consideration of this issue until damages and the merits of Count II have been determined.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment is granted as follows:

1. Ordinance 12 as written and as enforced discriminates against interstate commerce and is therefore invalid;

2. The County is permanently enjoined from enforcing the provisions of Ordinance 12;

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[6] The County asserts that plaintiffs are claim-precluded from challenging the constitutionality of Ordinance 12 prosecutions because they did not challenge its constitutionality while being prosecuted. In light of *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983), and the County's failure to articulate a Minnesota rule of claim preclusion which effects this result, the court concludes that there is no bar to plaintiffs' section 1983 claim.

3. Partial summary judgment on Counts I & III in favor of plaintiffs and against defendant is granted;

IT IS FURTHER ORDERED that defendant's motion to dismiss is granted with respect to Counts IV and V of the complaint and in all other respects is denied.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-95-220

ROBINSON RUBBER PRODUCTS CO., INC.; DEAN M. AKINS; PATRICK SCHOENECKER; and BRAD ROBINSON, individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

HENNEPIN COUNTY, MINNESOTA

Defendant.

ORDER

INTRODUCTION

This matter is before the court on several motions of the parties. Defendant Hennepin County moves to dismiss the Complaint, while plaintiffs move for class certification. Plaintiffs further move for partial summary judgment. For the reasons hereafter stated, the court denies in part and grants in part the County's motion, certifies the proposed class and grants plaintiffs' motion for partial summary judgment.

BACKGROUND

This is a companion case to *Oehrleins v. Hennepin County*, No. 4-94-63, which arises out of identical facts. In response to the Minnesota Waste Management Act,

Minn. Stat. § 115A.02, *et seq.*, Hennepin County ("the County") enacted Ordinance 12. Ordinance 12 is a waste flow-control regulation which, consistent with the Act and widespread practice, reflects the hierarchy of waste disposal methods. Processing is considered to be environmentally superior to land filling. Ordinance 12, as written, requires that all "Designated Waste" generated within Hennepin County shall be delivered to a "Designated Facility." The County, in implementing the ordinance, did not have to look far for a facility to designate. In the mid-1980s, the County issued approximately $150,000,000 in bonds for the construction of a "mass burn" facility which cost $129,000,000 to build. To date, only this facility (known as "HERC") and one other have been designated by the County. This designation permitted the County to charge a fee substantially higher than that charged by other waste disposal facilities.

Oehrleins involved haulers and processors of waste; the present case involves three generators of mixed municipal solid waste [1] who purport to represent themselves and "all persons similarly situated." Robinson Rubber Products is a commercial waste generator. Brad Robinson, its principal, is also a residential generator. Dean Akins and Patrick Schoenecker are residential generators who also own rental units in Hennepin County. Collectively, plaintiffs claim that Ordinance 12 discriminates against interstate commerce in violation of the Commerce Clause.[2] Plaintiffs also allege that Ordinance 12 violates the Sher-

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[1] As observed in *Government Suppliers Consolidating Serv., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990), this term denotes what is commonly referred to as "trash". *Id.* at 744 n.5.

[2] Article I, § 8, cl. 3 of the Constitution provides that: "Congress shall have the Power . . . [t]o regulate Commerce among the several states." In a long and unchallenged line of cases, the Supreme Court has taught that this provision preemptively limits the power of local governments to discriminate or unduly burden interstate commerce through their activities.

man Antitrust Act, the Due Process clause of the federal constitution and the Due Process clause of the Minnesota Constitution.

Plaintiffs challenge the ordinance as written because it prohibits the disposal of County waste out-of-state. In late 1993, the County suspended "until further notice" enforcement of the ordinance with respect to waste destined for out-of-state disposal. Therefore, plaintiffs also challenge the constitutionality of the ordinance "as enforced." Plaintiffs claim that both forms of the ordinance are discriminatory. They allege that they have been damaged because haulers of waste who paid increased fees passed those fees along to their customers.

I. Motion to Dismiss

A. Standard of Review

A motion to dismiss for failure to state a claim tests the sufficiency of the complaint. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). When analyzing a motion to dismiss, the court looks to the complaint as pleaded. The complaint must be liberally construed and viewed in the light most favorable to the plaintiff. The court will dismiss a complaint only when it appears the plaintiff cannot prove any set of facts that supports the claim. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

B. The Tax Injunction Act

As in the *Oehrleins* case, the County argues that this court lacks jurisdiction to entertain the generators' claims because of the Tax Injunction Act, 28 U.S.C. § 1341: The Tax Injunction Act provides that:

> The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of that state.

28 U.S.C. § 1341. This prohibition extends to suits for injunctive relief and to section 1983 claims in which a plaintiff seeks an injunction. *Burris v. City of Little Rock*, 941 F.2d 717, 720 (8th Cir. 1991).

An essential predicate for invoking this defense is a determination that Ordinance 12 constitutes a tax. Whether it does so is a question of federal law, and this court need not defer to the label given by the County. *Wright v. McClain*, 835 F.2d 143, 144 (6th Cir. 1987). The County does not argue that Ordinance 12 is a tax, rather the County suggests that plaintiffs characterize the fee-generating aspects of Ordinance 12 as a funding measure and thus a "tax." This position can perhaps be traced to the County's reliance on *Indiana Waste Systems v. County of Porter*, 787 F. Supp. 859, 865 (N.D. Ind. 1992). *Indiana Waste Systems* involved a $0.20 fee levied on each cubic yard of waste disposed of at plaintiff's landfill. In considering a Tax Injunction Act defense to the plaintiff's suit, the court stated that "IWS agrees that the fee is a tax by stating [in its complaint] '[]no statute grants Porter County the express authority to impose a tax such as the one contemplated by Section V of the Ordinance.' " *Id.*

Hennepin County's reliance on this case is misplaced. In determining whether Ordinance 12 is a tax the court must look toward the purpose underlying the ordinance. If it is primarily a revenue-raising measure, then it may be considered a tax. *Marigold Foods v. Redalen*, 809 F. Supp. 714, 719 (D. Minn. 1992). On the other hand, if it is primarily regulatory or punitive in nature, then it is not a tax. *Id.*; *see also American Petrofina Co. of Texas v. Nance*, 859 F.2d 840, 841 (10th Cir. 1988) ("the mere fact that a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised").

Ordinance 12 clearly raises revenue. However, the "tipping fee" which the County has been able to charge is not the primary feature of the ordinance. Rather, the ordinance regulates the flow of waste originating in Hennepin County. The revenue raised, while undeniably significant, is incident to the requirement that waste must go to the County's designated facilities. As it is not a tax, the court is not precluded from considering the constitutionality of Ordinance 12.

B. Standing

The County next disputes plaintiffs' standing to challenge Ordinance 12. Stading is an essential, threshold determinant of the propriety of judicial intervention. *Warth v. Seldin*, 422 U.S. 490, 517-618 (1975). The tripartite test articulated by the Supreme Court requires plaintiffs to demonstrate that: (1) there exists an "injury in fact"—the invasion of a legally protected interest, which is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is "fairly traceable" to the challenged action, rather than to the conduct of some third party not before the court; and (3) it is likely, as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

The County essentially argues that plaintiffs' injuries are indirect and only tenuously related to the assertedly unconstitutional conduct. As customers of the haulers (either directly or through a contracting municipality), the County suggests that generators were not the actual target of the ordinance, only the haulers were. The court notes that the County has not been straightforward and consistent on this point. In arguing that the haulers lacked standing in *Oehrleins*, the County stated to this court that, "the full cost of solid waste management was made visible and obvious to, and borne by, the waste generators." Def's Mem. Opp. Summ. J. at 5. This is

difficult if not impossible to reconcile with the County's present position that any harm to the generators was indirect. Although plaintiffs suggests that the County might be equitably estopped from advancing these inconsistent positions, Article III's standing requirement is jurisdictional, and the court must satisfy itself that its prerequisites are met.

The showing required to establish standing turns on the stage of litigation at which the issue must be determined. *Lujan*, 112 S. Ct. at 2136. In other words, although standing must exist throughout the case in order for the court to have jurisdiction, the burden on plaintiffs to demonstrate it may vary. The County challenges standing by way of a motion to dismiss, which requires it to demonstrate that plaintiffs can prove no set of facts which establish standing. *Lujan*, 112 S. Ct. at 2137; *Oehrleins v. Hennepin County*, 867 F. Supp. 1430, 1434 (D. Minn. 1994). Of course, the court must accept plaintiffs' allegations as true, and the court "presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 112 S. Ct. at 2137. Plaintiffs have plainly met this modest hurdle for they claim that the ordinance is unconstitutional, and that they have suffered and continue to suffer economic injuries traceable to its enforcement by the County. Moreover, "a plaintiff does not lack standing simply because her injury is an indirect product of the defendant's conduct". *Garelick v. Sullivan*, 987 F.2d 913, 919 (2nd Cir. 1993). The County raises questions regarding the determination of plaintiffs' damages, but that is insufficient to defeat plaintiffs' claims.

The County also makes the argument that plaintiffs' injuries, if any, will not be redressed by a favorable verdict. The County suggests that it is "entirely conjectural" that plaintiffs will receive a concrete benefit of reduced garbage collection rates as a result of a favorable ruling. This contention overlooks the fact that plaintiffs are

seeking approximately $100,000,000 in damages for injuries already sustained due to Ordinance 12. The County's argument is also premised upon the assumption that the variables intrinsic to the determination of what rates the generators pay for trash removal preclude the possibility that non-monopolized tipping fees will resut in lower prices. Plaintiffs have presented evidence that the market for waste-processing services is highly competitive and that removal of the "distorting" impact of Ordinance 12 will have a beneficial impact on the prices generators pay. The court concludes that it is likely that a favorable decision will positively affect the costs incurred by generators.

Finally, the County argues that if plaintiffs prevail, it will be but a Pyrrhic victory as property taxes will necessarily rise to cover the loss of revenue which Ordinance 12 generates. Thus, plaintiffs will pay from one pocket what they receive into the other. This argument is entirely conjectural and without any basis whatsoever in the record before the court.

Because plaintiffs seek summary judgment, the court must consider whether the County has raised any genuine issue of material fact which precludes a decisive finding that plaintiffs have standing. *Cf., Lujan*, 112 S. Ct. at 2137 (at summary judgment stage, plaintiffs may not rest on "mere allegations" to establish standing). Although the court expects the record to be supplemented further with respect to damages, the testimony of plaintiffs that they were injured is essentially undisputed. The County's arguments go to the means of identifying and calculating the damages sustained. Robinson Rubber provides an illustration of this. In 1992, its hauler changed billing practices to charge Robinson by the ton. Its bills reflected a hauler charge, plus the fee for disposal paid to the County. These costs were "double[]" what Robinson Rubber paid prior to 1992. It is true that this example also illustrates some of the problems precise damage calculations will pose, as Bradley Robinson testified

that his hauler bore the brunt, though not all, of the Ordinance 12 rate increases prior to that time. However, this does not affect standing. These injuries are concrete and particularized, actual and fairly traceable to anti-competitive effects of Ordinance 12. Moreover, these injuries can be redressed by an award of damages as well as an injunction against further enforcement of Ordinance 12. In short, the "irreducible constitutional minimum of standing" is met. *Lujan*, 112 S. Ct. at 2136.

The conclusion that indirect consumers have standing is bolstered by several holdings which have permitted indirect claims to proceed. In this respect Article III standing limitations merge imperceptibly into the "prudential" limitations on jurisdiction. These concerns are implicated where a party seeks redress for a "generalized grievance", *see Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-227 (1974), or attempts to assert the rights of third parties. *Warth v. Seldin*, 422 U.S. 490, 500 n. 12 (1974). The essential limitation imposed by these prudential concerns is that the plaintiff be within the "zone of interests" protected by the statute or constitutional provision relied upon, here the Commerce Clause. *Clarke v. Securities Industry Association*, 479 U.S. 388, 396 (1987).

Although the Supreme Court did not describe its concerns in *Lujan* as "prudential", it clearly implicated this consideration:

> When, however, as in this case, a plaintiff's asserted injury arises from the governments' allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by inde-

> pendent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been made in such a manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the governmental action or inaction he challenges, standing is not precuded, but it is ordinarily "substantially more difficult" to establish.

Lujan, 112 S. Ct. at 2137 (internal citations omitted).

In Data Processing Service v. Camp, 397 U.S. 150 (1969), the Court permitted a provider of data processing services to challenge a regulation which would have permitted banks to provide the same services, and thus compete with the plaintiff. Although this interest in being free from competition was likely to be damaged, if at all, only by the unfettered choices which banks might make regarding data processing services, the court found the plaintiff to be within the zone of interests protected by a statute which arguably precluded such competition. Similar interests were at work in a Commerce Clause challenge to a New York law which preferentially taxed securities transactions within New York state different from those with an out-of-state component. In *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318 (1976), the Court found that a regional stock exchange had standing to challenge the regulation. The exchange's interest was not limited to its associational status as a collection of securities traders, but included its interest in not having business diverted from its facilities to the New York Stock Exchange. *Id.* at 320 n.3. *See also Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 345 (1977).

The court does not see these results as being at odds with the Supreme Court's more recent pronouncements.

In *Lujan,* plaintiffs sought to require interagency cooperation consistent with the requirements of the Endangered Species Act. Plaintiffs claimed that this would have resulted in increased funding abroad related to the protection of endangered species. *Lujan,* 112 S. Ct. at 2137. The Court held that plaintiffs could demonstrate neither injury to their legally protected interests nor redressability. The Court noted that the "consultation" which the plaintiffs sought could not be effected by requiring a single agency (the Department of the Interior) to revise its regulations to require it to consult with other agencies; the other agencies, which had taken the position that no such consultation was required, would obviously not be bound by any such regulation. 112 S. Ct. at 2140-2142. This claim is an obvious far cry from one involving legislative immunity from competition, or a restriction on the free flow of interstate securities transactions which comprise one's business. *See also Wyoming v. Oklahoma,* 502 U.S. 437 (1992) (state had standing under Commerce Clause to challenge sister state's law requiring purchase of domestic coal by utilities; plaintiff deprived of "severance tax" revenues generated by utilities' purchases).

As indicated above, the County observes that haulers make independent choices about what rates to charge and the extent to which those rates reflect the costs of Ordinance 12. As the haulers are not before the court in this action, the court could not order that a refund be made or direct haulers to lower their rates. Finally, the County argues that as generators, plaintiffs do not participate in the interstate waste processing market, and thus fall outside the "zone of interests" protected by the Commerce Clause.

The fact that it is primarily the haulers who are regulated does not deny the plaintiffs standing to challenge the increased costs passed along to them. *In Central Arizona Water Conservation Dist. v. EPA,* 990 F.2d 1531 (9th Cir. 1993), plaintiff districts challenged tightened air

quality standards which the EPA imposed upon a privately-owned power station. The districts claimed that the cost of the regulations, which required $430,000,000 in initial capital costs alone, would be passed along to the districts. The EPA argued that the injury was indirect, attenuated and speculative because the facility might not pass the costs on. The Court of Appeals rejected this argument, noting that while the extent of the plaintiffs' economic harm was "not readily determinable," the regulation was likely to cause some amount of pecuniary harm, given the districts' contractual obligation to repay the facility's costs. 990 F.2d at 1538.

Likewise, as the court has stated, the precise amount of damages incurred by the generators remains to be determined. Moreover, it is true that several factors, of which unconstitutional conduct is but one, may have played a role in setting the prices that generators paid for waste removal. But there can be no doubt that waste removal is a necessity for the plaintiffs. There can be no doubt that to some extent, the plaintiffs' costs increased as their haulers were required to use designated facilities whose rates were not competitive with those established by the market. The metaphysical theories of causation which the County suggests do not explain the documented relationship between Robinson Rubber's costs and Ordinance 12. Moreover, redressability does not require the haulers to disgorge the excess fees which they passed along to their customers; the County, as a section 1983 defendant, is in a position to fully make amends. The court finds that the basic standing requirements are met.

The plaintiffs are also within the zone of interests protected by the Commerce Clause. The zone of interests test is not particularly demanding. *Clarke v. Securities Industries Ass'n.*, 479 U.S. 388, 399 (1987). "The Commerce Clause presumes a national market fee from local legislation that discriminates in favor of local interests." *C & A Carbone, Inc. v. Clarkstown,* 114 S. Ct. 1677,

1683 (1994). Plaintiffs are direct participants in the market for waste processing services, which is inherently interstate in character. It ignores reality to suggest that a generator who is actually paying someone to take his trash away, whether it be to Iowa, Indiana, or Minnesota, where it may be commingled and processed with wastes generated elsewhere should not be protected from discrimination against interstate commerce. The plaintiffs' interest in the fullest range of waste processing services, unfettered by the ordinance's strictures, are neither "marginally related to [n]or inconsistent with the purposes implicit" in the Commerce Clause. *See Clarke,* 479 U.S. at 399. The generator plaintiffs have met all of the prerequisites to invoke the court's jurisdiction.

C. Sherman Act Claims

For the reasons set forth in the court's prior order granting the County's motion to dismiss the haulers' Sherman Act claims in *Oehrleins,* the court dismisses the generators' Sherman Act Claims. *See Oehrleins,* 867 F. Supp. at 1435-1436.

D. Minnesota Constitution

The County argues that Count V, which articulates a violation of due process rights secured by Article I, § 7 of the Minnesota Constitution, fails to state a claim. Paragraph 91 of the complaint states that "Ordinance 12 impermissibly interferes with intrastate commerce in violation of the Minnesota due process clause." Paragraph 3 of the plaintiffs' prayer for relief requests damages as a result of this violation.

The court agrees that this count fails to state a claim. Minnesota does not recognize a damage remedy for violations of Art. I, § 7 of the Minnesota Constitution. *Bird v. State Dept. of Public Safety,* 375 N.W.2d 36, 40 (Minn. Ct. App. 1985). Moreover, the basis of plaintiffs' claim,

restriction of intrastate commerce, was rejected in *Waste Systems Corp. v. County of Martin*, 784 F. Supp. 641 (D. Minn. 1992). In *Waste Systems*, the court noted that, although the Minnesota Supreme Court held in 1975 that intrastate restrictions were invalid, this holding was legislatively overturned by Minn. Stat. § 115 A.80, *et seq.*, which explicitly authorized such restrictions. *Waste Systems*, 784 F. Supp. at 647. Accordingly, this claim is dismissed with prejudice.

E. Substantive Due Process

The County's position regarding the effect which this court should give to the discovery order entered in *Oehrleins v. Hennepin County*, No. 94-125494 (Hennepin Cty. Dist. Ct. Mar. 22, 1995) is unknown. As discussed in this court's order in *Oehrleins*, denying the County's second motion to dismiss the hauler action, Judge Oleisky of Hennepin County ruled that the crime-fraud exception to the work-product doctrine was unavailable to plaintiffs because there was no evidence that the County knew that continued enforcement of Ordinance 12 was in violation of the law. The County urged this court to give preclusive effect to that ruling, and dismiss the haulers' substantive due process claim that the County arbitrarily and capriciously enforced Ordinance 12 despite knowing of its unconstitutionality. The court denied the motion because a finding that the crime-fraud exception is inapplicable does not implicate the haulers' due process claim. *See Oehrleins v. Hennepin County*, Civil No. 4-94-63, order dated March 28, 1996.

The County has repeated the argument in its motion to dismiss the generator's claims, specifically arguing that Robinson Rubber, a plaintiff in the state action, was collaterally estopped and that Judge Oleisky's ruling was persuasive authority as to the remaining generators. However, in its reply memorandum in support of its motion to dismiss the generators' claims, the County states: "Henne-

pin County does not suggest that Judge Oleisky's March 22, 1995 discovery order directly addressed the haulers' due process claims." Apparently the County's present position is that the discovery order is merely persuasive authority with respect to all the generators' claims, including Robinson Rubber, and possibly the haulers' claims as well. The court does not find the discovery order persuasive on the issues relevant to these proceedings. The County's motion to dismiss Count II is denied.

II. Class Certification

Plaintiffs seek to certify a class consisting of:

> All residential and commercial generators of mixed municipal solid waste in Hennepin County who paid for waste removal at any time during the period June 1, 1989 to the present.

The named plaintiffs are proffered as class representatives, and counsel for the representatives seeks to also represent the class. A class action is a procedural tool permitting the aggregation of claims which, for matters of economy or practicality, are unlikely to be brought individually. Federal Rule of Civil Procedure 23 defines the criteria which a putative class must meet if it is to be certified by the court. The burden of demonstrating that the Rule's requirements are met rests with plaintiffs. Although plaintiffs' allegations are accepted as true, the court must subject them to "rigorous analysis" to satisfy itself that certification is proper. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 659 (D. Minn. 1991). Moreover, certification is inherently conditional and subject to the court's continuing scrutiny. Fed. R. Civ. P. 23 (c)(1). Against this standard, plaintiffs have made the required showing.

The four essential prerequisites to certification are numerosity, commonality, typicality and adequacy of representation. Fed. R. Civ. P. 23 (a). Further, plain-

tiffs must demonstrate that the factual or legal questions common to the class predominate over individual ones, and that a class action is superior to other methods for fair and efficient adjudication. Fed. R. Civ. P. 23 (b)(3).

A. Numerosity

The County does not challenge plaintiffs' observation that the class includes a large percentage of Hennepin County's population. There are several hundred thousand potential class members. Joinder of all potential litigants is inconceivable. The class is sufficiently numerous.

B. Commonality

The class members' claims share the common question of the constitutionality of Ordinance 12. While individual damage questions are certain to arise, the fact of economic impact on the market for waste processing services resulting from the designation is also a common issue.

C. Typicality

Typicality requires that the claims of the representatives emanate from the same event or legal theory as those of the class members. *In Re Workers Compensation*, 130 F.R.D. 99, 105 (D. Minn. 1990). In other words, in proving their own claims, the representatives must also prove the claims of the class members. *Id.* at 105 n.4. This does not require a perfect identity among the respective claims, and factual differences will not preclude certification. *Id.* at 106.

The County argues that various differences cause the class to be so varied that the court should not permit certification. The County suggests that landlords, such as named plaintiffs Akins and Schoenecker, stand in a different position than their tenants. The County argues that, since both tenants and landlords arguably "paid for" waste processing services, they may have different claims,

depending on the specific contractual relationship between each tenant and landlord. Plaintiffs respond that this is an illusory distinction, and that the class includes only those who "directly paid" a hauler or other entity for disposal services. The court finds that this is a common sense reading of the class description, and that there is no intra-class conflict in this regard. Further, the court incorporates this distinction into the class definition. Thus, the proposed class does not include tenants who paid more to their landlords because of costs passed on to the landlords by haulers or municipalities and ultimately passed on to the tenants.

The County also recites a long list of speculative and theoretical conflicts between present Hennepin County generators and past generators. These conflicts reflect the County's continued speculation regarding property taxes and the outcome of this litigation. As with its motion to dismiss, the County makes no factual showing in this regard. The court finds that the interests of present and former residents are coextensive. To the extent that facts and consultation with counsel inform them otherwise, class members may opt out of the class. "A court is not authorized to dismiss a class action based upon a substantial legal claim simply because some members of the class prefer to leave the violation of their rights unremedied." *In Re Potash Litigation*, 159 F.R.D. 682, 692 (D. Minn. 1995).

D. Adequacy of Representation

The County argues that Robinson Rubber may not be an appropriate representative as it is a plaintiff in the parallel state action challenging Ordinance 15. The County further argues that Robinson Rubber's interest in prevailing in state court places the class members at great risk of being "sold out". There is some currency to this suggestion. As a commercial entity, Robinson Rubber likely generates much more waste than the typical household. Because Ordinance 15 exacts a $60 per ton waste

management fee on waste such as that generated by Robinson Rubber, it may well conclude that it has a greater interest in eradicating Ordinance 15 than it has in securing classwide damages for Ordinance 12 violations.

That this possibility is a concrete one is evidenced by a November 17, 1994, letter apparently sent by counsel representing both the haulers, including Robinson Rubber, as well as the putative generator class which stated:

> If the matter [the hauler lawsuit] cannot be resolved immediately, we probably will include the generators as a separate class for damage purposes. . .
>
> Nevertheless, we are primarily interested in obtaining immediate relief from Ordinance 15. If that can be accomplished, the incentive to expand the litigation to include a large class entitled to damages for the past unconstitutional actions is diminished.[3]

This is a disturbing indication of where counsel and Robinson's loyalties may lie. It indicates that prosecution of a generator class action is merely a tactic designed to leverage the County into settling the parallel state lawsuit. Counsel is presumed to speak on behalf of his client, and the court infers that Robinson Rubber's zeal for advocating the generator's rights is not completely coextensive with its interest in litigating Ordinance 15. However, the court does not find that this case presents the same conflicts apparent in *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667 (N.D. Ohio 1995). There, DES plaintiffs in a parallel state action were potentially in a position to identify specific manufacturers of DES responsible for their injuries. However, such information may have

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[3] The County has not provided the court with a copy of this letter, because it was transmitted in the context of settlement negotiations. Counsel for both parties are directed to certify whether the quoted excerpts are accurate, or in the alternative, provide the court with a copy of the letter.

been unavailable for large portions of the class which these plaintiffs sought to represent. These divergent vantage points created the possibility that the defendants could "pick off" the representative plaintiffs by settling their individually stronger claims. *Id.* at 678-679.

By contrast, Robinson Rubber does not appear to be in this position. Unless it were to collude with certain plantiffs, the County cannot meaningfully settle the state action without implicating a large number of potential generator class members who are also subject to Ordinance 15. Moreover, the court understands that Ordinance 15 has been sustained by the state court, though subject to appeal. This fact further limits the potential for conflict. Additional protection is found by the inclusion of two individual named plaintiffs who, insofar as the record reveals, are not connected with Robinson Rubber or the parallel state action. Finally, the court is fully cognizant of the stewardship role which class certification imposes upon it; it will zealously guard against any attempt to sacrifice the interests of the class.

"Rule 23(a)(4) [also] demands a standard of practice [for class counsel] which exceeds the 'usual quality of practice' before a federal court." *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 679 (N.D. Ohio 1995) (quoting *Jackshaw Pontiac v. Cleveland Press Pub. Co.*, 102 F.R.D. 183, 193 (N.D. Ohio 1984)). Counsel for plaintiffs has admirably represented the interests of his clients in both this case and in *Oehrleins*. However, adequacy of representation in a class action entails more than technical proficiency. The court must satisfy itself that conflicts between the class and counsel do not exist and that counsel's loyalties lie undividedly with the generator class. *See Kurczi*, 160 F.R.D. at 679. Further, Minnesota Rules of Professional Conduct 1.7 prohibits a lawyer from representing a client where that representation is either directly adverse to, or materially limited, by the lawyer's responsibilities to another. This court has ample power to

eliminate such conflicts in the class action context. Fed. R. Civ. P. 23 (d)(3); *see also Kurczi*, 160 F.R.D. at 679 (disqualifying class counsel due to conflict); *Jackshaw*, 102 F.R.D. at 192 ("The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.") (quoting *Sullivan v. Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978)).

Counsel for the putative class currently represents certain individual haulers in the related federal and state *Oehrleins* actions. The court finds that counsel's continued representation in these actions does not compromise the interests of the putative class. The court notes, however, that it would be an unacceptable conflict for counsel to represent a putative class of haulers or municipalities affected by Ordinance 12. Considering the current status of all actions, however, the court is satisfied that the class will be adequately represented.

E. Predominance

"There are no bright lines for determining whether common questions predominate." *In Re Workers Compensation*, 130 F.R.D. 99, 108 (D. Minn. 1990). The County argues that common questions, specifically regarding damages, do not predominate over individual issues. The County reiterates arguments noted earlier, which recite the complex interplay of economic factors dictating the price for waste processing services. It is urged that individual variations in disposal contracts, amounts generated, and choices regarding whether to support the County's waste management system mask similarities between claims. These arguments are not without merit, but they have been answered by the great number of antitrust cases which have been certified as class actions. *See e.g., In Re Potash Litigation*, 159 F.R.D. 682 (D. Minn. 1995) (predominance identified in upward trend of prices, despite individualized transactions); *In Re Do-*

mestic Air Transportation Antitrust Litigation, 137 F.R.D. 677 (N.D. Ga. 1991) (certification of class involving over 400 million transactions); *In Re Workers Compensation,* 130 F.R.D. 99 (D. Minn. 1990) (250 defendant insurers monopolizing market involving over 10,000 class members).

Common to these holdings is the view that "so long as there is some common proof to adequately demonstrate some damage to each plaintiff," the mere existence of individual questions does not preclude a finding of predominance. 130 F.R.D. at 108. Plaintiffs have submitted the affidavit of Dr. Timothy Nantell, an expert in finance. The affidavit details how damages common to the class might be ascertained. Nantell divides the class into three subclasses—commercial generators, residential generators served by private haulers, and residential generators served by municipalities. Consistent with the antitrust model, the affidavit shows how the charges assessed to each subclass might be calculated "but for" the effects of designation. *See e.g., In Re Potash,* 159 F.R.D. at 696.

As might be expected, the County replies with the affidavit of Arthur H. Cobb, formerly of several well-known accounting firms.[4] Cobb raises questions regarding the validity of Nantell's models, and the available data regarding price variation. However, these arguments, aptly described as a "battle of the experts", are misplaced at the certification stage. *In Re Potash,* 159 F.R.D. at 697; *In Re Domestic Air Transportation,* 137 F.R.D. at 693. "Whether or not [plaintiffs' expert] is correct in his assessment of common impact/injury is for the trier to decide, at the proper time." *In Re Catfish Antitrust Litigation,* 826 F. Supp. 1019, 1042 (N.D. Miss. 1993). The plaintiffs' burden is to articulate a credible model for

[4] The County moved to strike the affidavits of Dr. Nantell and Mark Berkman. That motion was denied. The County's alternative motion for leave to submit a surreply was granted.

determining damages. Plaintiffs have done so and the County will have the opportunity to subject it to exacting scrutiny in later proceedings.

F. Superiority

The County argues two reasons why a class action is not superior here. First, it argues that the class members will receive no real benefit. This argument, however, is a continuation of the County's hypotheses regarding property taxes. It is unsubstantiated, and thus, unpersuasive.

The County's remaining argument turns on the question of manageability. As it did with respect to the other prerequisites, it points to the seemingly innumerable layers of factors which will have to be exfoliated to determine damages. As Judge Rosenbaum concisely observed, "[m]anageability is a real issue." *In Re Workers Compensation*, 130 F.R.D. 99, 110 (D. Minn. 1990). However, the court continued:

> [D]efendants' parade of horrors is chimerical. They know, as does this Court, that this case can be managed. It does not take a battalion of rocket scientists to handle a large case—although each side clearly have talented and competent counsel. If the plaintiffs' claims are substantiated . . . the class action mechanism is clearly the most efficient means of resolving the many claims which may be asserted.

Id. at 110. In short, both the court and counsel are up to the task.

For the foregoing reasons the class is conditionally certified as:

> All residential and commercial generators of mixed municipal solid waste in Hennepin County who directly paid for waste removal at any time during the period June 1, 1989 to the present.

Certification, however, is subject to such further subclassification or redefinition as may become appropriate. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1976) (holding that indirect purchasers could not recover damages for the "passing-on" of costs due to anti-competitive conduct; reaffirming that direct purchasers could recover the full costs of anti-competitive conduct, notwithstanding the claim that these costs were passed on to other levels in the distribution chain).

IV. Motion for Partial Summary Judgment

A. Standard of Review

The court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This standard mirrors the standard for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), which requires the trial court to enter judgment as a matter of law if there can be but one reasonable conclusion as to the verdict. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). Ther is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249.

On a motion for summary judgment, the court views the evidence in favor of the nonmoving party and gives that party the benefit of all justifiable inferences that can be drawn in its favor. *Id.* at 250. The nonmoving party, however, cannot rest upon mere denials or allegations in the pleadings. Nor may the nonmoving party simply argue facts supporting its claim will be developed later or at trial. Rather the nonmoving party must set forth specific facts, by affidavit or otherwise, sufficient to raise a genuine issue of fact for trial. *Celotex Corp. v. Catrett,*

477 U.S. 317, 324 (1986). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. *See Anderson*, 477 U.S. at 250-51. If a plaintiff fails to support an essential element of a claim, however, summary judgment must issue because a complete failure of proof regarding an essential element renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. With this standard in hand, the court addresses plaintiffs' motion for partial summary judgment.

B. Discrimination Under the Commerce Clause

The Commerce Clause of the United States Constitution provides that "Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. This clause of the Constitution is also understood to have a negative or dormant application which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon*, 114 S. Ct. 1345, 1349 (1994). Thus, the dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). The Supreme Court has also recognized, however, the right of states to adopt regulations designed to safeguard the health and safety of its people even though such regulations may incidentally burden interstate commerce. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The Supreme Court has held that solid waste is an article of commerce and legislation by the states which restricts its movement is subject to constitutional scrutiny. *Id.* at 622-23.

In a Commerce Clause challenge, the burden is initially on the plaintiff to show that the legislation is discriminating against interstate commerce on its face or in its

purpose or effect. *Hughes v. Oklahoma*, 411 U.S. 322, 326 (1979). Discrimination for purposes of the Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter." *Oregon Waste*, 114 S. Ct. at 1350. If a statute discriminates in favor of a local investment, it is *per se* invalid unless the state can prove, "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, —— U.S. ——, 114 S. Ct. 1677 (1994).

1. Ordinance 12 As Written

The County argues that Ordinance 12 and its accompanying designation "permit the free flow of waste." Def's Mem. Opp. Summ. J. at 12 n.11. The County thus seeks to distinguish Ordinance 12 from the very similar regulation struck down in *Carbone*. That regulation required all waste generated or channeled locally to be shipped to the municipally-built transfer station. Hennepin County's interpretation of the effect of Ordinance 12, however, is inconsistent with the plain language of the ordinance. Where waste may only be shipped to designated facilities, or a very limited number of exempted ones, the flow of waste is in no sense "free". The County's assertion that existing facilities (both in- and out-of-state) were "grandfathered" in by Ordinance 12 is irrelevant. More recent facilities are no less discriminated against because then-existing facilities were exempted.

Moreover, the ordinance and accompanying designation clearly favor in-state interests over out-of-state ones. In *Carbone*, the muniicpality argued that all waste, regardless of origin, was subject to processing at the designated facility. The municipality in *Carbone* therefore asserted that there was no discriminatory barrier. Hennepin County's argument, while somewhat confusing, is similar. The County suggests that the distinction drawn

in Ordinance 12 concerns processing versus landfilling with a preference for the former. "In effect, Ordinance 12 as written barred the disposal of unprocessed waste only in landfills, both in-state and out-of-state." Def's Mem. Opp. Summ. J. at 12-13. This argument is unhelpful because the County may not prohibit landfilling beyond Minnesota's borders. *Carbone,* 114 S. Ct. at 1683. Moreover, it is incorrect to suggest that Ordinance 12 does not act with reference to location. The designation which gives effect to the ordinance requires processing at the two County-related facilities.[5]

In short, "[t]he ordinance is no less discriminatory because in-state . . . processors are also covered by the prohibition." *Carbone,* 114 S. Ct. at 1682; *Waste Systems Corp. v. County of Martin,* 784 F. Supp. 641 (D. Minn. 1992), *aff'd,* 985 F.2d 1381 (8th Cir. 1993). Like the regulation in *Carbone,* the ordinance hoards the demand for waste processing (itself an article of commerce) for the benefit of the preferred facilities. It is thus discriminatory and subject to strict scrutiny.[6]

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[5] The County disputes whether it "owns" HERC. It does not dispute, however, the fact that whatever ownership/management structure may currently exist, the County has an obvious financial interest in the success of its $129,000,000 investment. The court notes that the State of Minnesota apparently thinks that HERC is a county-owned facility. *See* Solid Waste Fee Report, December 1994 ("Hennepin County has contracts with HERC, the county-owned waste-to-energy plant' "). The County also does not dispute the plaintiffs' claim that it has a financial interest in the NSP facility, though it appears that interest is limited to the County's obligation to provide it with approximately 60,000 tons of waste per year.

[6] In *Harvey & Harvey v. Chester,* 68 F.3d 788, 802-80 (3d Cir. 1995), *cert. denied,* 1996 WL 236315 (U.S. March 18, 1996), Third Circuit suggested that a designating municipality might rebut a showing of discrimination with regard to outcome if it could demonstrate neutrality in the selection prcoess. Even if the validity of that precedent is assumed, the County has made no effort to produce the "substantial evidence" required. *Harvey,* 68 F.3d at

Ordinance 12 may survive strict scrutiny if the County can demonstrate that it had no other means to advance a legitimate local interest. *Carbone,* 114 S. Ct. at 1683. There can be no dispute, in light of the solid waste crisis which has given rise to much litigation nationwide, that environmentally sound waste disposal is a legitimate governmental objective. The County asserts that there were no alternatives to designation.

The problem with the County's position, however, is that it is based on the premise that the County's waste disposal efforts must be self-sustaining and financially isolated from general County activities.[7] Designation is, in effect, a financing measure designed to ensure the viability of the County's investment. The County candidly admits as much and more when it points to the range of environmental programs funded by Ordinance 12 fees. This is precisely the sort of purpose which the Supreme Court invalidated in *Carbone*: "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Carbone,* 114 S. Ct. at 1684. While subsidization of its facility through general taxes may be unattractive to the county, the Supreme Court specifically endorsed that as a nondiscriminatory alternative for municipalities to secure the long-term survival of environmentally superior waste processing. *Carbone,* 114 S. Ct. at 1684. The record demonstrates that this was never a serious option for the County in light of its stated criteria. The County cannot rely, however, on a discrimi-

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803. In light of the fact that the County primarily designated its own facility, this would indeed require a convinicng showing of neutrality. Because the County has not advanced this argument, however, the court need not consider whether *Harvey* is applicable.

[7] *See* Exh. Q. to the Affidavit of Charles N. Nauen, at 2 (financial consultant's opinion letter to County reciting criteria for solid waste plan, including "The County views the project as a self-financing, self-supporting enterprise isolated from the County's general operations.").

natory regulation to compensate for its unwillingness to impose potentially less popular measures.

2. Ordinance 12 as Enforced

This case is in a somewhat unusual posture due to the County's temporary suspension of Ordinance 12 with respect to out-of-state disposal. As the foregoing discussion makes clear, Ordinance 12 is constitutionally infirm as written. Plaintiffs challenge Ordinance 12 on the basis of interstate effects, notwithstanding its limited enforcement. The court, therefore, will also consider the constitutionality of Ordinance 12.

The County recycles its standing arguments detailed earlier by arguing that the plaintiffs could not have suffered injury due to any restriction on interstate commerce. In response, plaintiffs recite several interstate effects despite the facially intrastate restrictions effective under Ordinance 12 as enforced. First, plaintiffs assert that the haulers on whom they rely are precluded from entering into long-term out-of-state hauling contracts because of the threat that enforcement might resume. This argument is persuasive as it appears that the County had precisely this result in mind. A memorandum sent from the County's internal legal counsel to the County administrator stated:

> [S]uspending the enforcement of designated waste destined for disposal outside the state of Minnesota [] would put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time . . .
>
> The risk [that the entire Ordinance may be found to be unconstitutional] is, however, probably preferable to suspending enforcement of both in-state and out-of-state disposal, resulting in the County losing the waste altogether, to long-term hauler contracts.

Affidavit of Alexandra B. Klass Exh. 9.[8]

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[8] The County argues that this is privileged work product, and/or attorney-client communications. Once disclosed, however, the com-

The County might have avoided providing plaintiffs with standing to challenge Ordinance 12 on this basis had it simply chosen to amend Ordinance 12 permanently. Instead, it elected to keep the threat of out-of-state enforcement viable for the apparently express purpose of discouraging interstate commerce. In light of this conclusion, the court considers the ongoing threat of enforcement to constitute part of the actual enforcement of Ordinance 12. This threatened enforcement is discriminatory and without justification.

Plaintiffs also claim that the ordinance discourages out-of-state concerns from competing in Minnesota for the processing of Hennepin County waste. Thus, while the ordinance as written prohibits the exportation of waste for processing, the ordinance as enforced prohibits the importation of waste processing services. The County characterizes the issue somewhat differently, arguing that while Ordinance 12 may favor certain in-state interests over others, and certain out-of-state concerns over in-state ones, it does not implicate the Commerce Clause.

The County directs the court's attention to *Vince Refuse Services, Inc., v. Clark County*, 1995 WL 253121 (S.D. Ohio March 7, 1995), in support of this contention. At issue in *Vince Refuse* was an ordinance aimed at encouraging recycling. It mandated that all recyclable waste had to be routed through the County's chosen facility, the chosen landfill, or be shipped out-of-state. The incentive to recycle was provided by a fee which was charged for each ton of landfilled waste. A hauler bypassing recycling would pay more than it would when recyclables were removed. The district court rejected a Commerce Clause challenge to the ordinance reasoning that while it was discriminatory, such discrimination was only among purely in-state interests:

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munication looses its privileged character. Although it strenuously objects to plaintiffs' use of this document, the County recites no facts or law to justify a finding of non-waiver.

> To borrow from the Supreme Court in *Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979)] the Commerce Clause was intended to prevent economic Balkanization among the states . . . That provision of the Constitution was not intended to prevent economic Balkanization within a state. Herein, the protectionist aspect of the flow control regulations does not curtail the movement of solid waste into or out of Ohio. Therefore, those regulations do not discriminate against interstate commerce; rather the flow control regulations discriminate against intrastate commerce.

Vince Refuse, 1995 WL 253121 at *9.

This analysis, however, fails to recognize the true burden to interstate commerce which designation ordinances effect. Even where out-of-state "safety valves" exist, such ordinances prohibit the importation of waste processing services which are indisputably an article of commerce. *Carbone,* 114 S. Ct. at 1682. Consequently, the court must consider whether the ordinance hinders the movement of waste processing services as well as restricts the movement of waste. As the Supreme Court observed:

> The essential vice in laws of this sort is that they bar the import of the processing service . . . In *Dean Milk* [*Co. v. Madison,* 340 U.S. 349 (1951)] the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out of state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Carbone, 114 S. Ct. at 1683.

Here, an out-of-state processor simply may not compete in Minnesota for the processing of Hennepin County

waste. The distinctions drawn by the ordinance are not, as the County suggests, between in-state and out-of-state landfills; they are between its local, proprietary facilities and all other interests, including out-of-state facilities. Nor does the ordinance simply distinguish between environmentally superior and inferior methods of disposal. An out-of-state concern which built a state-of-the art processing facility in the middle of Hennepin County could not lawfully receive any waste from the County. This is classic discrimination against interstate commerce. Thus, the County must justify its discrimination, subject to the court's searching scrutiny. As described above, the County has failed to do so. Moreover, consistent with the Supreme Court's analysis in *Carbone,* the conclusion that Ordinance 12 as enforced is discriminatory renders unnecessary any inquiry as to whether it can be justified under the balancing test set forth in *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). Accordingly, the court holds that Ordinance 12, as written and as enforced, is an invalid attempt to protect local interests (principally, the County's) from interstate competition. Summary judgment on Count I in favor of plaintiffs and against defendant is therefore granted.

C. 42 U.S.C. § 1983

Plaintiffs' Commerce Clause challenge is also predicated upon 42 U.S.C. § 1983. After the Supreme Court's decision in *Dennis v. Higgins,* 498 U.S. 439, 451 (1991), it is clear that § 1983 supports such claims. Liability is evident as a result of the foregoing discussion. Availability, distribution and amount of damages, however, remains in dispute. Thus, the court grants plaintiffs' motion for partial summary judgment on Count III based on liability and denies it as to damages.

Plaintiffs also move for attorney's fees pursuant to 42 U.S.C. § 1988. As a prevailing party, plaintiffs are entitled to attorney's fees. The court defers consideration

of this issue until damages and the merits of Count II have been determined.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. The proposed class, as modified, is certified;

2. Ordinance 12 as written and as enforced discriminates against interstate commerce and is therefore invalid;

3. The County is permanently enjoined from enforcing the provisions of Ordinance 12;

4. Partial summary judgment on Counts I & III in favor of plaintiffs and against defendant is granted;

5. Defendant's motion to dismiss is granted with respect to Counts IV & V and in all other respects is denied.

Dated: March 29, 1996

/s/ David S. Doty
DAVID S. DOTY
Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-2120MNMI

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Appellees,

vs.

HENNEPIN COUNTY,
Appellant,

STATE OF MINNESOTA, ETC., *et al.*,
Amici Curiae.

No. 96-2170MNMI

ROBINSON RUBBER PRODUCTS, CO., INC., *et al.*,
Appellees,

vs.

HENNEPIN COUNTY,
Appellant,

STATE OF MINNESOTA, ETC., *et al.*,
Amici Curiae.

ORDER DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 10, 1997

Order Entered at the Direction of the Court

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

ORDINANCE NUMBER TWELVE
SOLID WASTE DESIGNATION
FOR
HENNEPIN COUNTY

DEPARTMENT OF PUBLIC WORKS
DIVISION OF ENVIRONMENT AND ENERGY

ADOPTED BY THE
HENNEPIN COUNTY BOARD OF COMMISSIONERS
OF HENNEPIN COUNTY, MINNESOTA
ON DECEMBER 10, 1985
AMENDED ON OCTOBER 11, 1988

IN ACCORDANCE WITH
MINNESOTA STATUTES, SECTIONS 473.811
AND 115A.86

October 11, 1988

ORDINANCE NUMBER TWELVE
SOLID WASTE DESIGNATION ORDINANCE
FOR HENNEPIN COUNTY

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ORDINANCE NUMBER TWELVE
SOLID WASTE DESIGNATION ORDINANCE
FOR HENNEPIN COUNTY

An Ordinance regulating the flow of solid waste in Hennepin County, Minnesota; defining the geographic area and the types and quantities of solid waste subject to designation; specifying the point or points of delivery of the solid waste; requiring that the designated solid waste be delivered to the specified point or points of delivery; establishing procedures and principles to be followed by the County in establishing and amending rates and charges at the Designated Facility; excepting from the Ordinance certain materials, and stating additional regulations governing waste collectors and other matters.

WHEREAS, the Waste Management Act of 1980, Minnesota Statutes, Sections 115A.01 to 115A.72, as amended, and Minnesota Statutes, Section 473.801 to 473.834, as amended, collectively the "Act", require the County to seek to abate the need for land disposal of solid waste; and

WHEREAS, it is the desire of the County to reduce the volume of solid waste generated in the County that is being deposited in landfills and to recover the energy resources contained in such solid waste; and

WHEREAS, the County has entered into a contract for the design, construction and operation of a large scale solid waste resource recovery facility in the County (the Hennepin Energy Resource Co.—HERC—Facility), for the purposes of (1) disposal of residential, commercial and industrial solid waste, thereby reducing the volume of solid waste being deposited in landfills, and (2) recovery of material and energy from solid waste for resale; and

WHEREAS, in order to finance and operate the HERC facility, the County must have assurance that sufficient quantities of Designated Waste will be delivered pursuant

to Minnesota Statutes, Section 473.811, subd. 10. and Sections 115A.80, et. seq.; and

WHEREAS, the County is authorized to designate a resource recovery facility at which all or any portion of the solid waste generated within the County must be delivered pursuant to Minnesota Statutes, Section 473.811, subd. 10, and Sections 115.80, et. seq.; and

WHEREAS, the County has evaluated the benefits of designating a resource recovery facility for required use and found that such a facility will serve public purposes and welfare by conserving and recovering resources, furthering waste management plans and policies, reducing the need for land disposal of solid waste and further finds that the required use of the facility is necessary for the financial support of the facility, and no less restrictive method will assure an adequate reliable supply of waste; and

WHEREAS, the County has adopted a comprehensive solid waste master plan which includes a plan for designation approved by the Metropolitan Council as required by Minnesota Statutes, Section 115A.84; and

WHEREAS, the County has complied with the procedures established for designating a Facility for required use under Minnesota Statutes, Section 115A.85; and

WHEREAS, the County is authorized to implement designation by this Ordinance pursuant to Minnesota Statutes, Section 115A.86;

NOW, THEREFORE, the County Board of Hennepin County, Minnesota, does ordain;

SECTION I. DEFINITIONS

The terms defined in this Section shall, for the purposes of this Ordinance, have the meanings herein specified, unless the context clearly otherwise requires:

Subsection 1. *"Acceptable Waste"* shall mean garbage, refuse, and other solid waste from residential, commercial, industrial and community activities which is generated and collected in aggregate, including limited quantities of large household appliances, mattresses, non-burnable construction debris, tree and agricultural wastes and tires, excepting however, Unacceptable Waste as defined herein.

Subsection 2. *"County"* shall mean Hennepin County, Minnesota.

Subsection 3. *"County Board"* shall mean the Hennepin County Board of Commissioners and their authorized representatives.

Subsection 4. *"Department"* shall mean the County's Department of Public Works, Division of Environment and Energy.

Subsection 5. *"Designated Waste"* shall mean "mixed municipal solid waste" as defined in Minnesota Statutes, Section 115A.03, subd. 21, which means garbage, refuse, and other solid waste from residential, commercial, industrial and community activities which is generated and collected in aggregate, but does not include auto hulks, street sweepings, ash, construction debris, mining waste, sludges, tree and agricultural wastes, tires, and other materials collected, processed and disposed of as separate waste streams; excepting, however, Unacceptable Waste as defined herein.

Subsection 6. *"Designation"* shall mean the requirement contained in Section II herein, that all of the Designated Waste that is generated within the County's boundaries, as required by State law, be delivered to one of the transfer stations, or, upon County approval to the HERC Facility.

Subsection 7. *"Designation Plan"* shall mean that document entitled "Hennepin County Designation Plan" which detailed the County's proposal for the Designation of waste, and which was approved by the Metropolitan

Council on April 25, 1985, pursuant to the statutory designation procedures contained in Minnesota Statutes, Section 115A.90.

Subsection 8. *"Effective Date"* shall mean the date from and after which Designated Waste must be delivered to the Facility, as specified in Section VII, Subsection 6 hereof.

Subsection 9. *"Facility"* shall mean the HERC Facility and/or the transfer stations.

Subsection 10. *"HERC Facility"* shall mean the resource recovery Facility to be constructed and operated in Minneapolis, Minnesota, at the intersection of Seventh Street North and Sixth Avenue North, as more fully shown on Exhibit P.

Subsection 11. *"Hauler"* shall mean a collector or transporter of Designated Waste licensed under Section III hereof.

Subsection 12. *"Hazardous Waste"* has the meaning given to it in Minnesota Statutes, Section 116.06, subd. 13, and in the Federal Resource Conservation and Recovery Act (42 U.S.C. Section 6903 (5)), and in regulations promulgated pursuant to either of the foregoing, as any of which may be amended from time to time.

Subsection 13. *"Person"* shall mean any individual, corporation, partnership, joint venture, association, trust, unincorporated association, or government or any agency or political subdivision thereof, including, without limitation, landfill operators, Designated Waste generators and Haulers in the County.

Subsection 14. *"Special Fee"* shall mean the charge payable by any Person to the County for the disposal of certain Unacceptable Waste as defined herein.

Subsection 15. *"Tipping Fee"* shall mean the charge payable by each Person under Section V of this Ordinance to the County for the disposal of waste.

Subsection 16. *"Transfer Stations"* shall mean the Interim or Permanent facilities for receiving Waste at the following locations:

Interim Facilities

A. Minneapolis North transfer station—north of North 26th Avenue, east of Pacific Street North, south of North 28th Avenue. See Exhibit A for location map.

B. Minneapolis South transfer station (old): North of East 29th Street, east of 20th Avenue, south of 28th Street, and west of Hiawatha Avenue. See Exhibit B for location map.

C. Osseo transfer station, southwest corner of State Highway 152 and Old County 18, north of County Road 109, and east of Monticello Lane North. See Exhibit C for location map.

D. Hennepin County Truck Station—Corcoran—700 County Road 10, northeast corner of County Roads 10 and 19. See Exhibit D for location map.

E. Hennepin County Public Works Facility—Hopkins—320 Washington Avenue South, west of County Road 18, south of Third Street South, north of Fifth Street South, and east of Sixth Avenue. See Exhibit E for location map.

F. Hennepin County Truck Station—Orono—3880 Shoreline Drive, north of County Road 15 and east of Bayview Place. See Exhibit F for location map.

G. Hennepin County Truck Station Ossea—217 S. Jefferson Highway, southwest corner of State Highway 152 and Old County Road 18, north of County Road 109, and east of Monticello Lane North. See Exhibit G for location map.

H. Hennepin County owned land in Maple Grove at the Northwest corner of County Road 109 and Zachary Lane. See Exhibit H for location map.

I. Hennepin County owned land at the Northeast corner of County Roads 201 and 19, Medina. See Exhibit I for location map.

J. Reuter Recycling, Inc.—14405 W. 62nd Street, Eden Prairie—south of County Road 67—East of Island Road, and west of railroad tracks. See Exhibit J for location map.

K. NSP—Elk River RDF Facility—the north corner of Trunk Highway 10 and Tyler Street N.W., Elk River. See Exhibit K for location map.

L. Packer River Terminal, Minneapolis—southeast corner of North Washington Avenue and Dowling Avenue North. See Exhibit L for location map.

M. City of Minneapolis Patching Plant, Minneapolis—southwest corner of East 26th Street and Hiawatha Avenue. See Exhibit M for location map.

N. Minneapolis Water Works, Fridley—west of East River Road, east of the Mississippi River, north of 37th Avenue. See Exhibit N for location map.

O. Bloomington—southeast corner of 24th Avenue South and East 82nd Street. See Exhibit O for location map.

P. Mn/DOT Truck Station, Bloomington—southwest corner of I-494 and France Avenue South, and northeast of West 80th Street. See Exhibit P for location map.

Q. Chicago Avenue Transfer (CAT), Bloomington—333 East 78th Street, (0.2 miles west of Portland Aveue South). See Exhibit Q for location map.

R. Mn/DOT Truck Station, Eden Prairie—west of T.H. 169, south of County Road 61 and north of Valley View Road. See Exhibit R for location map.

S. Mn/DOT Truck Station, Fort Snelling—southeast corner of Minnehaha Avenue and T.H. 55. See Exhibit S for location map.

T. Mn/DOT Central Services, Fort Snelling—6000 Minnehaha Avenue, 0.6 miles south of T.H. 55. See Exhibit T for location map.

U. Hennepin Cooperative Seed Exchange, Dayton, 11810 Brockton Lane, southeast corner of County Road 101 and T.H. 152. See Exhibit U for location map.

V. HERC Facility. Same as Permanent Facility E.

Permanent Facilities

A. Minneapolis South transfer station (new): north of East 29th Street, east of 20th Avenue, south of 28th Street, and west of Hiawatha Avenue. See Exhibit V for location map.

B. Bloomington transfer station: north of west 96th Street, east of James Avenue, south of West 94th Street, and west of I-35W. See Exhibit W for location map.

C. Brooklyn Park transfer station; north of 77th Avenue North, west of County Road 18, and east of Old County Road 18. See Exhibit X for location map.

D. Plymouth transfer station: north of County Road 6, east of I-94, south of Watertower Circle, and west of Xenia Lane North. See Exhibit Y for location map.

E. HERC Facility—Minneapolis, northeast of Seventh Avenue North, north of the railroad tracks, southwest of Fifth Street North, and South of Sixth Avenue North. See Exhibit Z for location map.

Subsection 17. *"Unacceptable Waste"* shall mean:

(a) Unacceptable Waste at transfer stations: Unacceptable Waste at the transfer stations includes,

but is not limited to, hazardous waste as defined in Minnesota Statutes, Section 116.06, subd. 13 (1984), as amended, and the Resource Conservation and Recovery Act, 42 U.S.C. 6903 (5); hazardous waste of any kind or nature, such as explosives, radioactive materials, cleaning fluids, crankcase oils, cutting oils, paints, acids, caustics, poisons, drugs, or other materials that would be likely to pose a threat to health or public safety, or cause injury to or adversely affect the operation of the transfer stations; pathological and biological wastes; ashes, foundry sand; sanitary sewage and other highly diluted water-carried materials or substances; all sludges, including sewage sludge and septic and cesspool pumpouts; human and animal remains; auto hulks and other motor vehicles, including such major motor vehicle parts as transmission, rear-ends, springs and fenders; agricultural and farm machinery and equipment; liquid wastes; large quantities of nonburnable demolition debris; street sweepings; mining waste; large household appliances, mattresses, construction debris, trees, agricultural waste and tires in excess of the quantities allowed as Acceptable Waste; and waste which was generated outside of the County unless accepted by the County pursuant to Section IV, Subsection 8.

(b) Unacceptable Waste at the HERC Facility: Unacceptable Waste at the HERC Facility includes Unacceptable Waste at transfer stations and, in addition thereto, the following: incinerator residue, human waste, automobile and small vehicle tires to the extent the air emission criteria applicable to the HERC Facility are violated by their combustion, marine vessels and major parts thereof, transformers, trees and

lumber more than six feet long or one foot in diameter, nonburnable construction material, demolition or other construction debris, any materials that if processed at the HERC Facility to be classified as hazardous waste, and waste which was generated outside of the County pursuant to Section IV, Subsection 8.

Subsection 18. *"Waste"* shall mean all solid waste delivered or caused to be delivered to the Facility by any Person.

SECTION II. DESIGNATION

Subsection 1. *Application of Ordinance.* This Ordinance shall govern the transportation and disposal of all Designated Waste generated or disposed of within the County, as required by State law, and all Haulers and other Persons engaged in transportation or disposal of Designated Waste within the County.

Subsection 2. *Designation.*

(a) Interim facilities. On and after the effective date, all designated waste generated within the County, as required by State law, must be delivered to one of the transfer stations on the list of interim facilities. The list of interim facilities shall be established from those interim facilities set forth in Section I, Subsection 16, of this ordinance, by separate County Board resolution, and may be amended from time to time by subsequent County Board resolutions. The list of interim facilities established by the County Board, and any amendments, shall be effective upon not less than 60 days notice to waste haulers by the County Administrator, and such notice shall identify each facility's location, its hours of operation and any other appropriate information.

(b) Permanent facilities. As permanent facilities are constructed and able to receive waste, the County shall place such facilities in service to receive waste and shall promptly close all nearby interim facilities which each permanent facility has replaced. The County Administrator shall notify waste haulers not less than 60 days in advance of such closure of any interim facility, identify the location of each permanent facility and the hours of operation and any other appropriate information.

(c) Upon County approval, waste from certain areas of the County may be delivered to the HERC facility.

(d) Other than the above-mentioned facilities, waste may not be delivered to any other disposal site except as provided in Subsections 3 and 4 herein and in Section 4, Subsection 7.

Subsection 3. *Exceptions.* The following materials shall be exempt from Designation:

(a) Materials that are separated from solid waste and recovered for reuse in their original form or for use in manufacturing processes, as provided in Minnesota Statutes, Section 115A.83

(b) Materials processed at another resource recovery Facility, provided that:

1. Such Facility was in operation at the time of approval by the Metropolitan Council of the County's Designation Plan, on April 25, 1985;

2. Such materials shall be exempt only at the processing capacity of such other Facility in operation at the time of approval of the Designation Plan;

3. The owner of such Facility shall provide documentation to the Department within 30 days following a written request to do so by the Department, substantiating the following: the existence of the Facility at the time of the Designation Plan approval; the amount of materials processed at the Facility at that time; that the Facility remains in operation, and such other information as the Department may require.

(c) Waste excluded from the County's Designation by Metropolitan Council action on April 25, 1985, but only so long as, and only to the extent that, such exclusions remain in effect and the excluded Facility is operational and the waste is delivered to the excluded Facility.

(d) Materials otherwise subject to Designation for which negotiated contractual arrangeemnts with the County exist that will require and effect the delivery of the waste to the Facility for the term of the contract; provided that this exception shall apply only during the term of such contract and only if there is no default thereunder.

(e) Materials which the Department determines on a case-by-case basis should be exempt for reasons of public health and safety, under such conditions as the Department may specify. The Department shall make its determination based upon written application. At its option, the Department may convene an informal hearing with the applicant to consider the application.

Subsection 4. *Suspension of Designation Requirement.* The County, by resolution of the County Board, may suspend the Designation requirement of subsection 2 of this Section at any time. If the County suspends the Designation requirements of subsection 2 of this section, no Person may deliver any waste to the Facility unless in

accordance with the County resolution or until such time as the County reinstates the Designation requirement. This provision does not relieve any Person of any obligation to comply with all other applicable federal, state, or local laws or ordinances. The County will provide reasonable notice of any suspension and subsequent reinstatement of the Designation requirement to Haulers, municipalities, and landfill operators in the County.

Subsection 5. *Restricted Access to Bloomington Transfer Station.* For Haulers depositing waste at the Bloomington transfer station the following designated truck routes shall apply:

(a) All packer trucks operating outside Bloomington shall use the following designated route: I-35W to West 94th Street, West 94th Street to James Avenue South, James Avenue South to West 96th Street, and West 96th Street to the waste transfer station;

(b) All packer trucks operating within Bloomington shall use the following designated route: James Avenue South between West 94th Street and West 98th Street to West 96th Street and then to the transfer station.

(c) All transfer trailer rigs shall use the following designated route: I-35W to West 94th Street, West 94th Street to James Avenue South, James Avenue South to West 96th Street, West 96th Street to the transfer station.

The return routes in each instance shall be the same as the approach routes.

SECTION III. LICENSES

Subsection 1. *Licenses Required.* On and after the Effective Date, each hauler engaged in, and each truck or other conveyance used in, the business of collecting or transporting Designated Waste within the County must

have a valid license issued by the County. Annual Fees as set by the County Board resolution shall be charged for each license. It shall be a condition of the license that the hauler complies with all requirements set forth in subsections 2 through 11 hereof.

Subsection 2. *Guidelines.* All haulers shall operate within the guidelines set forth in the license. All guidelines shall be established or modified by County Board resolution.

Subsection 3. *Lettering.* The hauler's name or firm name, shall be printed or painted in legible letters not less than three inches in height, on both sides of all trucks and conveyances used to collect or transport Solid Waste within the County. In addition, all trucks and conveyances shall have a license decal affixed to the left side of the cab of the vehicle or conveyance by which it was issued, as directed by the Department. The hauler must maintain the license so that is readily visible and legible at all times.

Subsection 4. *Equipment.* All equipment used for the collection and transportation of Solid Waste for delivery pursuant to this Ordinance shall be completely enclosed and securely covered, shall be kept free of leaks and in good repair and safe operating condition and shall comply with all regulations which may from time to time be enacted by resolution of the County Board. The County or other entity receiving the waste at the Facility may reject any delivery of Waste delivered by equipment in violation of this Subsection 4. Each hauler shall furnish and maintain records with the County concerning equipment used by each hauler, including state license number and identification of each vehicle operating within the County and such other information as required by the Department.

Subsection 5. *Title to Waste.* Each hauler shall be deemed to have title (ownership) to all Waste delivered to the Facility pursuant to the Ordinance and will defend,

indemnify and hold the County harmless from any and all claims of ownership brought against the County with respect to said Waste which may affect the clear title of the County with respect to said Waste at the time of its acceptance by the County. Each hauler shall retain all rights, title (ownership) and responsibility with respect to the Waste until such time as the Waste is delivered to the Facility and accepted by the County. The County may, for purposes of inspection, require that the Waste be deposited next to the receiving pits for transfer to the pits by the County. When the Waste is accepted by the County as Designated Waste, all rights and title (ownership) with respect thereto shall thereupon be transferred from each hauler to the County, except to the extent the County subsequently rejects previously accepted Waste as Unacceptable Waste as provided in Setcion IV, subsection 4. For purposes of this subsection 5 the term "County" shall mean either the County or any other entity receiving the Waste at the Facility.

Subsection 6. *Indemnification of County.* Each hauler shall take all precautions necessary to protect the public against injury and shall defend, indemnify and the save the County harmess from any liability, claims, damages, costs, judgments, expenses and claims of damages that may arise by reason of any tort claim for bodily or personal injury, disease, or death or damage to property resulting directly or indirectly from an act or omission of the hauler, its agents, employees, or independent contractors, including, but not limited to, damages and claims of damages caused by Unacceptable Waste, hot loads delivered by such hauler, fires or explosions caused by hot loads after delivery, driver caused damages to any part of the Facility and the cost of cleanup of Waste contaminated by such hauler, and against any and all claims, liens and claims of liens for labor performed or material furnished incident to the performance by such hauler of its obligations under this Ordinance. Each hauler shall also defend, indemnify and save the County

harmless from and against all liabilities, losses, damages, cost, and expenses (including attorney's fees and expenses of the County), causes of action, suits, claims, demands and judgments of any nature arising from violation of this Ordinance by such hauler.

Subsection 7. *Insurance.* Each hauler shall obtain and furnish to the County evidence of all insurance required under this subsection, covering all vehicles to be used and all operations to be performed under this Ordinance. Such insurance may be provided by each hauler and separately by the individual subcontractors and independent contractors; or, in the alternative, each hauler may furnish evidence of such insurance covering itself as well as all of its subcontractors and independent contractors as additional insureds. Existence of the insurance required herein shall be established by furnishing certificates of insurance issued by insurers duly licensed with the State of Minnesota, in force on the date of commencement of any performance under this Ordinance, and continuing for a policy period of at least one (1) year and providing public liability insurance, including general liability, automobile liability, products liability (if applicable), and loading and unloading liability, with the following coverages:

(a) Bodily and personal injury liability in the amount of at least $100,000 for injury or death of any one hauler in any one occurrence.

(b) Bodily and personal injury liability in the amount of at least $300,000 for injuries or death arising out of any one occurrence.

(c) Property damage liability in the amount of at least $100,000 for any one occurrence.

The above limits of liability are subject to change by resolution of the County Board.

Such general liability and automobile liability insurance policy or policies shall provide contractual liability

insurance, specifically referring to and covering the obligation of each hauler, its subcontract haulers and independent contractor haulers to defend, indemnify and save harmless the County, its officers, agents, and employees from alleged claims or causes of action for bodily injury or property damage as provided in Section III, subsection 6, hereof.

Said general liability and automobile liability policy or policies shall contain an endorsement as follows:

> "The policy to which this endorsement is attached is intended to comply with and furnish the coverages required by Section III, subsection 7 (insurance) or Ordinance Number Twelve adopted December 10, 1985, and subsequent amendments, by Hennepin County. If anything in any other attachment, endorsement or rider conflicts with the provisions of said Section III, subsection 7, then the provisions of said Section III, subsection 7 shall prevail.
>
> "Any deductible amount provided for in any part of the policy will be paid by the insurer upon establishment of legal liability of any insured, and the insurer shall be entitled to reimbursement from the insured for such deductible amount."

Said policies of insurance shall be furnished by each hauler to the County for examination and approval, together with a certificate or certificates executed by an authorized representative of the insurer, certifying to the insurance coverage herein required, and stipulating that the policy will not be cancelled, or any material change effected, without first giving thirty (30) days' written notice to the County. After examination and approval of said policies by the County, they will be returned to each hauler or the appropriate subcontractors or independent contractors but the certificates of insurance will be retained by the County. Upon request by the County each hauler or its subcontractors or independent contractors shall promptly furnish to the County for examina-

tion at any time all contracts of insurance required herein. Each hauler shall furnish the County with evidence satisfactory to the County of the continuance of such insurance, signed by an authorized representative of the insurance carrier.

Notwithstanding the foregoing, all municipalities and municipally owned and operated waste collection vehicles shall be exempt from all insurance requirements contained in this Subsection 7, provided that they furnish evidence acceptable to the County of their ability to respond to all financial obligations to the limits of their liability under Minnesota Statutes, Chapter 466.

Subsection 8. *Reports.* On or before January 31 of each year after the Effective Date and on such other dates as the County shall request, each hauler will submit to the County a written report of its operations within the County during the previous year covering matters relating to this Ordinance as the Couty shall specify from time to time by resolution of the County Board.

Subsection 9. *Compliance with State Laws.* Haulers shall at all times operate its business of collecting, transporting, and disposing of municipal solid waste in compliance with all rules, regulations and requirements of the State of Minnesota.

Subsection 10. *Licenses not Transferable.* Licenses issued under the provisions of this Section shall not be transferable. Any attempted transfer of any such license shall immediately void such license.

Subsection 11. *Licensing Procedures.* The procedure for application for, issuance or denial of license required by this Ordinance shall be as follows:

(a) *Application*: Application for a license or license renewal shall be made to the Department and shall be on forms furnished by the Department. Applications for license renewal shall be received by the Department at least sixty (60)

days prior to the expiration of the current license. The application shall contain such facts as are required by the form provided by the County for the granting of a license.

(b) *Payment of Fee*: The Fees required for a license shall be paid at the office of the Department. No license fee shall be prorated for a portion of a year and no license fee shall be refunded. No license shall be issued until the Fees therefor have been paid in full.

(c) *Penalty for late Payment*: Every Hauler whose licensed activity is licensed by the County other than the one who has been closed down or who has not operated such activity in the County after the expiration of the licensing year, shall pay to the County Board the regular license fee and in addition thereto the following penalty for late application for a renewal license.

1. One to seven days late, a twenty-five percent penalty.

2. Eight to thirty days late, a fifty percent penalty.

3. After the expiration of thirty days from the due date, the activity for which the license is required shall cease. No new license or permit for such activity shall be considered before the owner of the business appears personally before the County Board. If the new license or permit is approved, the fee shall consist of the amount set forth for new licenses and permits, plus the late penalty fee that was not paid for the old license.

(d) *Late Payment of the License Fee with Penalty No Bar to Prosecution for Operating Without a License*: The late payment of the license fee along with the penalty set forth in paragraph

(c) above is no bar to any prosecution by the County for operating any licensed activity within the County without a license therefor.

(e) *Issuance or Denial of a License*:

1. The Department shall have 30 days to issue or deny the license or renewal. Failure by the Department to act on an application for a new license within the 30 days shall constitute a denial without prejudice to the applicant's right to renew a license in full force and effect until action is taken.

2. Once the Department has decided on the disposiiton of the license application or renewal application, the applicant shall be notified in writing of its decision.

3. Where a liecnse is denied, the Department shall state the factual basis for its decision and notice of its decision shall be personally served on the applicant or shall be served by registered or certified mail to said applicant at the address given in the license application. The applicant shall have ten working days, exclusive of the day of service, to request a hearing. The request shall be in writing, stating the grounds for appeal and served personally or by registered or certified mail on the Department by midnight of the 10th working day following service of the notice of denial. If the applicant fails to request an appeal within the specified time period, any opportunity for a hearing is forfeited and the Department's decision is final. After receipt of an appeal request, the Department shall set a time and place for the hearing.

SECTION IV. DELIVERY OF WASTE

Subsection 1. *Delivery of Waste.* Each Person shall use its best efforts to deliver only Acceptable Waste to the Facility. The County shall not accept any Waste that does not constitute Designated Waste, except the Court will accept Acceptable Waste. The County shall have the right, but not the obligation, to inspect all vehicles delivering Waste to the Facility. The obligation of each Person not to deliver Unacceptable Waste to the Facility shall not be limited by any inspection of such Person's vehicle by the County. If the County in the exercise of its reasonable judgement determines that a vehicle contains any Unacceptable Waste, the County may reject the entire delivery and the Person delivering such delivery shall forthwith remove such entire delivery from the Facility for proper disposal elsewhere. All costs of such removal and disposal shall be borne by each Hauler.

Each Person shall have the sole responsibility to remove from the Facility Unacceptable Waste it has delivered and pay the resulting cost, notwithstanding any prior acceptance of such Waste as Designated Waste by the County. Such removal shall be accomplished promptly after notice, verbal or written, is received by such Person from the County that any Waste previously delivered by such Person is Unacceptable Waste. However, either before or after such notice, if in the judgment of the County the situation requires immediate action, the County may remove and dispose of the Unacceptable Waste and charge the costs of removal and disposal to such Person.

Subsection 2. *Delivery Conditions.* Each Person shall deliver all Designated Waste and Acceptable Waste in accordance with the following terms and conditions:

(a) *Hours and Days of Delivery at Transfer Stations.* The County, unless it posts notice otherwise, shall accept deliveries of Designated Waste and Acceptable Waste at transfer stations during the following operating hours (except for the legal holidays listed below, during which no

deliveries will be accepted unless the County agrees otherwise):

7:00 a.m. to 6:00 p.m., Monday-Saturday

Legal holidays are New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. Any change in the hours or days of delivery, unless for a temporary period due to unusual circumstances, shall be pursuant to resolution of the County Board.

(b) *Hours and Days of Delivery at HERC Facility.* The County, unless it posts notice otherwise, shall accept deliveries of Designated Waste and Acceptable Waste at the HERC Facility during the following operating hours:

4:00 a.m. to 8:00 p.m., Monday-Saturday and
4:00 a.m. to 12:00 noon Sundays and all holidays.

Any change in the hours of days of delivery, unless for a temporary period due to unusual circumstances, shall be pursuant to resolution of the County Board.

(c) *Form of Waste.* All Waste shall be in substantially the same form and consistency as when it came under the control of each Hauler, or other Person, except that such Waste may be compacted when compaction is desirable for transportation.

(d) *Facility Rules.* Each Hauler or other Person delivering Waste pursuant to this Ordinance will comply with all rules and regulations posted at the Facility.

Subsection 3. *The County's Credit and Payment Policies.*

The Tipping Fees for each month shall be computed on the basis of the applicable rate of payment multiplied by the total tonnage of Waste delivered by each Hauler to the Facility during such month or part of any month. The monthly invoice shall include the total Tipping Fee due, minus any transportation costs, and any other fees

and charges due and owing to the County pursuant to this Ordinance.

The County shall endeavor to issue invoices by the third working day of the current month (the month the bill is recived by the hauler). Payment is due by the end of the month that the bill is received by the hauler. Haulers from which payment was not received in the current month shall be sent a past due notice by the 15th day of the following month from the date of billing.

If payment is not received by the end of the following month, those haulers must pay on a "cash only" basis. Haulers missing more than one payment will thereafter have to pay on a "cash only" basis permanently unless or until the hauler's credit is renewed by the County. A late payment penalty of 1.5% per month on the unpaid balance shall be charged to haulers for which payment was not received in the current month.

The County may seek other actions as set forth in Section VI, VIOLATIONS AND PENALTIES, against haulers for which payment has not been received by the end of the following month from the date of billing.

Provisions in this Ordinance shall apply both to monthly invoices and separate or special invoices.

Notwithstanding any dispute regarding the amount due listed on the invoice, each Hauler shall pay the disputed amount. If a disputed amount has been paid by a Hauler and the dispute is resolved in favor of such Hauler, the County shall reimburse the disputed amount plus daily interest in such disputed amount from the date such disputed amount was received by the County, at an annual rate equal to the applicable interest rate as provided in the previous paragraph of this Subsection 3.

If the County at any time determines the amount due listed on the invoice for a particular month was less than the actual amount due, the County may issue a separate

invoice for the amount not previously billed or add the amount not previously billed to the next subsequent monthly invoice as a separate item with an accompanying explanation.

Subsection 4. *Payments by Persons other than Haulers.* Charges for Waste delivered by Persons other than Haulers shall be in accordance with schedules and procedures adopted by resolution of the County Board.

Subsection 5. *Street Cleanup Charges.* If in the sole judgment of the County a Hauler during any period of time is primarily responsible for all or a portion of waste littering roadways leading to the Facility, the County may charge such Hauler the entire cost of the removal and disposal of such waste or such portion of such waste. Each Hauler's share of the cost of such removal and disposal shall be added to the next monthly invoice to each Hauler.

Subsection 6. *Weighing, Transferring or Rerouting at Interim Facilities.* The County Board shall establish a list of interim facilities in accordance with Section II, Subsection 2. The Director of Public Works may specify which interim facilities are locations where hauler trucks will be weighed and dispatched to another facility and which interim facilities shall unload hauler trucks and reload to transfer trucks, provided that no transfer of waste shall take place at the interim facilities described in Section I, Subdivision 16, except for the facilities designated as A, B, C, J, and V, and may also specify which interim facilities are for limited use and shall specify the conditions of such limited use. The list of interim facilities in effect, which are weigh facilities, which are facilities for waste transfer, which interim facilities are for limited use, and the conditions for such limited use, shall be on file with the Clerk of the Board and the Public Works Department.

At interim facilities for accepting waste, weighing and dispatching hauler trucks, the County shall weigh hauler trucks prior to dispatching trucks to another facility. The waste tonnage to be billed shall be determined by the County maintaining a list of empty truck weights for all hauler trucks operating in the County and subtracting the appropriate empty truck weight from the loaded hauler truck weight recorded at an interim facility.

Hauler trucks dispatched from an interim facility to another facility for disposal shall receive a reduction in the tipping fee charges based on the tons hauled and the mileage from the interim facility to the facility where the hauler truck was dispatched. Tipping fee reduction schedules shall be set by County Board resolution after a public hearing, and shall be on file with the Clerk of the Board and the Public Works Department.

At a permanent facility, the County may reweigh hauler trucks weighed and dispatched from interim facilities. A hauler with a reweighed truck having a higher waste tonnage than for the same load weighed at the interim transfer station shall be considered as having attempted to defraud the County and shall be subject to Section VI, Violations and Penalties.

Subsection 7. *Weighing at Permanent Facilities.* The County shall maintain at the Facility certified weighing scales. The tonnage of Waste delivered at the Facility shall be determined by weighing the vehicle immediately prior to depositing the Waste and immediately after depositing the Waste and subtracting the second weight from the first weight. However, the County reserves its right not to weigh the vehicle immediately after it deposits the Waste. Upon request, the County shall provide the driver of each Hauler's vehicle making a delivery of Waste to the Facility a receipt setting forth the first weight, the weight after depositing the Waste, the date, time, truck identification, and total tonnage of Designated Waste de-

termined to have been delivered to the Facility by such vehicle. Whenever any Waste is not accepted by the County, the outgoing vehicle shall be weighed and receipted in like manner. All such receipts shall be prepared in duplicate, with the County retaining one copy or a suitable machine record. Such receipts shall be used by the County as the basis for determining the payments required by Section V. For purposes of this subsection 6 the term "County" shall mean either the County or any other entity receiving the Waste at the Facility.

Subsection 8. *Duty to Accept Designated Waste; Failure to Accept Designated Waste at a Facility.* Notwithstanding anything in this Ordinance to the contrary, the Facility will accept all Designated Waste to the extent required by applicable Minnesota law. If at any time after the Effective Date the County is unable to receive all or any part of each Hauler's Designated Waste at the Facility, the County shall endeavor to verbally notify each Hauler's truck dispatcher and any other responsible party Designated by each Hauler for notification as soon as possible, such notification to be followed by written confirmation to each Hauler. The County shall also station an individual or post a sign during normal waste receiving hours to notify truck operators of the suspension of operations and to direct truck operators to an alternate Facility. In the event a suspension of operations occurs, each Hauler shall be responsible for the transportation of such Waste to such alternative Facility or if no alternative Facility has been identified by the County, to such landfill as each Hauler may choose. All cost of such transportation and disposal during suspension of facility operations shall be borne by each Hauler.

Subsection 9. *Acceptance of Acceptable Waste from Other Counties.* Upon the written request of a Hauler, the County will consider accepting Acceptable Waste generated outside the County wherein such waste is collected by the Hauler as only a portion of the total load,

and is accompanied by evidence satisfactory to the County that there is no violation of the other County's ordinances, and after written approval by the outside County has been obtained.

SECTION V. TIPPING FEES AND SPECIAL FEES

Subsection 1. *Payment.* Each Hauler or other Person who delivers Waste to the Facility must pay a Tipping Fee and/or any other applicable Special Fee to the Facility operator for Waste disposed of and accepted at the Facility.

Subsection 2. *Establishment of Fees.*

1. *Procedure.* The County Board of Commissioners shall establish or amend the Tipping Fee, Special Fees, and credits for haulers who are directed to haul designated waste from an interim facility to a facility specified by the County by resolution, and the same shall be on file with the Clerk of the County Board. The County Board shall endeavor to establish the Tipping Fee and Special Fees on or before August 30th of each year for the following calendar year. Notwithstanding the foregoing, the County Board shall have the right to amend the Tipping Fee and Special Fees at any time, but will endeavor to make the effective date of any such amended fee at least ninety (90) days after the amended fee is established. The resolution shall state the effective date of the Tipping Fee and Special Fees.

2. *Principles.* The County shall set the Tipping Fee and Special Fees and any amendments thereto, taking into account any of the following factors:

(a) all costs of acquisition, operation, and maintenance of the Facility;

(b) the cost to the County of Waste management services including those provided by the Facility;

(c) the cost to the Haulers of delivering Waste to the Facility;

(d) any economic incentive the County may provide; and

(e) any other factors which the County may determine has an impact on the Tipping Fee at the Facility.

SECTION VI. VIOLATIONS AND PENALTIES

Subsection 1. *Remedies Cumulative.* No remedy set forth in this Ordinance for violation of this Ordinance is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Ordinance, now or hereafter, existing at law or in equity or by statute. No delay in the exercise of any remedy for any violation of this Ordinance shall later impair or waive any such right or power of the County.

Subsection 2. *Misdemeanor.* Any person who fails to comply with the provisions of this Ordinance, other than failure to pay when due amounts due and owing to the County, is guilty of a misdemeanor. A separate offense shall be deemed committed upon each day or on which a violation occurs or continues.

Subsection 3. *Injunctive Relief.* In the event of a violation or a threat of violation of this Ordinance, the County may institute appropriate actions or proceedings including application for injunctive relief, action to compel performance or other appropriate action to prevent, restrain, correct or abate such violations or threatened violations.

Subsection 4. *Costs and Special Assessments.* If a Hauler or any Person within said County collects or disposes of Designated Waste in violation of this Ordinance,

the County may take the necessary steps to correct such violations and the costs thereof may be recovered in a civil action in any court of competent jurisdiction, or, at the discretion of the County Board, the costs may be certified to the County Director of Property Tax and Public Records as a special tax against the real property owned by such Hauler or Person.

Subsection 5. *Orders and Notices.* Whenever the Department or its authorized representative shall find a person or vehicle in violation of this Ordinance, the Department may issue such orders as may be necessary for the enforcement of this Ordinance governing and safeguarding the public health, welfare and safety. Any order or notice issued or served by the Department shall be complied with by the owner, operator, occupant or other person responsible for the condition or violation to which the order or notice pertains. Every order or notice shall set forth a time limit for compliance depending upon the nature of the solid waste and the danger created by the violation. In cases of extreme danger to the health, welfare, and safety of the public, immediate compliance shall be required.

Subsection 6. *Citations.* The Department or any of its duly authorized representatives shall have the power to issue citations for violations of this Ordinance, other than for violations resulting from failure to pay when due amounts due and owing to the County, but this shall not permit such representatives to physically arrest or take into custody any violator except on warrant duly issued.

(a) Form of Citations: Citations shall contain at least the following:

1. The name and address of the person charged with the violation of the owner or person in charge of the premises at which the violation occurs.

2. The date and place of the violation.
3. A short description of the violation followed by the section of this Ordinance violated.
4. The date and place at which the person receiving the citation shall appear and a notice that if such person does not respond, a warrant may be issued for such person's arrest.
5. the name of the person issuing the citation.
6. Such other information as the Court may specify.

(b) Issue of Citations: Whenever any representative of the Department discovers any violation of this Ordinance, he may issue a citation to the person alleged to have committed the violation and such citation shall be in the form specified in paragraph (a) of this subsection 6. Such citation shall be made out in quadruplicate (copies of 4). One copy thereof shall be issued to the person alleged to have committed the violation; two copies thereof shall be filed with the County Ordinance Violation Bureau.

(c) Issuance: The citation shall be issued to the person charged with the violation, or in the case of a corporation or municipality, to any officer or agent expressly or impliedly authorized to accept such issuance.

(d) Appearance: After the issuance of the citation and within such time as shall be fixed by court rule, the person charged with the violation shall report to the Violation Bureau.

(e) Complaint: If the person charged with the violation does not appear at the Bureau within the time specified by court rule, the Bureau shall send him a notice directing him to respond to

the citation within seven days of the date of the notice and if such person fails to respond, the Bureau shall cause a complaint to be signed and a warrant to be issued for the arrest of such person to compel his appearance in court.

Subsection 7. *Suspension of License.*

(a) Any license required under this Ordinance may be suspended by the Department for violation of any provision of this Ordinance. Upon written notice to the licensee said license may be suspended by the Department for a period not longer than 60 days or until the violation is corrected.

(b) Such suspension shall not occur earlier than ten working days after written notice of suspension has been served personally or by registered or certified mail on the licensee or, if a hearing is requested, until written notice of the county Board action has been served personally or by registered mail or certified mail on the licensee. Such written notice of Departmental suspension shall contain the effective date of the suspension, the facts which support the conclusion that a violation or violations have occurred, and a statement that if the licensee desires to appeal, he must within ten working days, exclusive of the day of service, file a request for a hearing. The hearing request shall be in writing stating the grounds for appeal and served personally by registered or certified mail on the Department by midnight of the 10th working day following service. Following receipt of a request for a hearing, the Department shall set a time and a place for the hearing. The hearing shall be conducted pursuant to the procedures in Section VI, Subsection 10 of this Ordinance.

(c) If said suspension is upheld and the licensee has not demonstrated within the 60-day period that the provisions of the Ordinance have been complied with and that such compliance will continue, the Department may serve notice of continued suspension for up to 60 days or initiate revocation procedures.

Subsection 8. *Summary Suspension of License.*

(a) If the Department finds that the public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered by the Department. Written notice of such summary suspension shall be personally served on the licensee at the address given in the license application. In addition, the Department may post copies of the notice of summary ssupension of the license on the Facility. Said posting shall constitute the notice required under this Section.

(b) The written notice in such cases shall be effective on the earlier of when such notice is posted or when such notice is mailed to the licensee, unless the notice specifies otherwise. The written notice shall state the effective date of the suspension and the nature of the violation requiring emergency action, the facts which support the conclusion that a violation or violations has occurred and a statement that if the licensee desires to appeal he must, within ten working days, exclusive of the day of service, file a request for a hearing. The hearing request shall be in writing stating the grounds for appeal and served personally or by registered or certified mail on the Department by midnight of the 10th working day following service. Following

receipt of a request for an appeal, the Department shall set a time and a place for the hearing.

(c) The summary suspension shall not be stayed pending an appeal or informal review by the Department Head, but shall be subject to dismissal on reinspection by the Department.

Subsection 9. *Suspension of Licenses, Reinspection.*

Upon written notification from the licensee that all the violations for which a suspension or summary suspension was invoked have been corrected, the Department, if appropriate, shall reinspect the vehicle or activity within a reasonable length of time, but in no case more than three working days after receipt of the notice from the licensee. If the Department finds upon any such reinspection or otherwise that the violations constituting the grounds for the suspension have been corrected, the Department shall immediately dismiss the suspension by written notice to the licensee.

Subsection 10. *Revocation of Licenses.*

(a) Any license granted pursuant to the Ordinance may be revoked by the Department for violation of any provision of this Ordinance.

(b) Revocation shall not occur earlier than ten working days from the time that written notice of revocation is served personally or by registered or certified mail on the licensee, or if a hearing is requested, until the written findings of the hearing have been served personally or by registered or certified mail on the licensee. Such written notice of Departmental revocation shall contain the effective date of the revocation, the nature of the violation or violations constituting the basis for the revocation, the facts that support the conclusion that a violation or violations has occurred and a statement that if the licensee

desires to appeal, he must within ten working days, exclusive of the day of service, file a request for a hearing. The hearing request shall be in writing stating the grounds for appeal and served personally by registered or certified mail on the Department by midnight of the 10th working day following service. Following receipt of a request for a hearing, the Department shall set a time and a place for the hearing.

Subsection 11. *Hearings.*

(a) If any applicant or licensee properly requests a hearing on a Departmental denial, suspension, or revocation of license, such hearing shall be held before the County Board and shall be open to the public.

(b) Unless the extension of time is requested by the appellant in writing directed to the Chair of the County Board, the hearing will be held no later than 45 calendar days after the date of service of request for a hearing, exclusive of the date of such service. In any event, such hearing shall be held no later than 90 calendar days after the date of service of request for a hearing, exclusive of the date of such service.

(c) The County Board shall mail notice of the hearing to the appellant and to the Department at least fifteen working days prior to the hearing. Such notice shall included:

1. A statement of time, place and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

3. A reference to the particular section of the Ordinance and rules involved.

(d) The County Board may, by resolution, appoint an individual learned in the law, to be known as the hearing examiner, to conduct the hearing to make findings of fact, conclusions, and recommendations to the County Board. The hearing examiner shall submit the findings of fact, conclusions, and recommendations to the County Board in writing. When the County Board exercises the authority to appoint a hearing examiner, the County Board shall accept the hearing examiner's report in lieu of conducting a County Board hearing for findings of fact, conclusions or recommendations.

(e) All witnesses shall testify under oath or affirmation with full penalty for perjury. All parties shall have full opportunity to respond to and present evidence, cross examine witnesses, and present argument. The hearing shall be tape recorded and minutes be kept, unless a party requests a transcript, in which case a verbatim transcript shall be made by a qualified court reporter at the expense of the requesting party.

(f) The Department shall have the burden of proving its position by clear and convincing evidence and all findings of fact, conclusions, and decisions by the County Board shall be based on evidence presented and matters officially noticed.

(g) The Rules of Evidence, as applied in the courts, shall not apply to the hearing, and irrelevant, immaterial, and unduly repetitous evidence shall be excluded. The hearing shall be confined to matters raised in the Department's written notice of suspension, summary suspension, or termination or in the appellant's written request for a hearing.

(h) A pre-hearing conference shall be held at least five working days prior to the hearing with a designated representative of the County Board. At the conference each party shall:

1. Provide ten copies of any documentary evidence in the possession of that party and two copies of any photographs, slides, or demonstrative evidence. If the demonstrative evidence is not capable of reproduction, the party possessing it shall bring the original, or two copies of an accurate photograph and ten copies of a thorough written description thereof.

2. State the full name and address of all witnesses who will be called at the hearing and a brief description of the facts and opinions to which each is expected to testify. If the names and addresses are not known, the party shall describe them thoroughly by job duties and involvement with the facts in issue.

(i) The representative of the County Board at the pre-hearing conference shall cause one copy of any documentary, photographic, or demonstrative evidence to be delivered promptly to the adverse party. All remaining copies shall be delivered promptly to the chair of the County Board for distribution among Board members and the Board's legal counsel, and/or for inclusion in the official record.

(j) Evidence not divulged at the pre-hearing conference, as provided above, shall be excluded at the hearing unless:

1. The evidence was not known to the party at the time of the pre-hearing conference; or

2. The evidence is in rebuttal to matters raised for the first time at or subsequent to the pre-hearing conference.

SECTION VII. GENERAL TERMS

Subsection 1. *Each Person's Obligations Unconditional.* Without limiting any of the other provisions of this Ordinance, all obligations of each person to make Tipping Fee payments and other payments due to the County under this Ordinance shall be absolute and unconditional, and each Person shall not be entitled to any abatement, diminution, setoff, abrogation, waiver, or modification thereof, nor to any termination of this Ordinance by any reason whatsoever, except as expressly provided herein, regardless of any rights of setoff, recoupment, or counterclaim that each Person might otherwise have against the County or any other party or parties and regardless of any contingency, unforeseen circumstance, event or cause whatsoever and not withstanding any circumstance or occurrence that may arise or take place before, during or after the Effective Date.

Subsection 2. *Separability.* It is hereby declared to be the intention of the Board of Commissioners of the County that the several provisions of this Ordinance are separable in accordance with the following:

(a) If any court of competent jurisdiction shall adjudge any provision of this Ordinance to be invalid, such judgment shall not affect any other provisions of the Ordinance not specifically included in said judgment.

(b) If any court of competent jurisdiction shall adjudge invalid the application of any provision of this Ordinance to a particular structure, site, Facility, or operation, such judgment shall not affect the application of said provision to any other structure, site, Facility, or operations not specifically included in said judgment.

Subsection 3. *Provisions Are Accumulative.* The provisions in this ordinance are accumulative and additional limitations upon all other laws and ordinances heretofore passed or which may be passed hereafter, covering any subject matter in this Ordinance.

Subsection 4. *No Consent.* Nothing contained in this Ordinance shall be deemed to be a consent, license, or permit to locate, construct or maintain a site, facility, or operation, or to carry on any activity.

Subsection 5. *Statement of Non-Liability.* Neither the Department nor the County nor any officer or employee thereof shall be held liable for any damage to persons or property by reason of any inspection, reinspection or failure to inspect, or by reason of the approval or disapproval of equipment or the granting, not granting, suspending or revoking of any license herein.

Subsection 6. *Effective Date.* This Ordinance shall be in full force and effect upon a date to be specified by resolution of the County Board at least sixty (60) days in advance of the effective date.

Passed by the Board of County Commissioners of Hennepin County this 11th day of October 1988.

COUNTY OF HENNEPIN
STATE OF MINNESOTA

By: /s/ John E. Derus
Chairman of the County Board

APPROVED 9-1-88

/s/ Nancy A. Schwappach
Assistant County Attorney

ATTEST:

/s/ [Illegible]
Deputy Clerk of the County

DO12F
9/21/88

[All Maps Omitted in Printing]

APPENDIX F

[Pertinent Excerpt from Ordinance 12,
As Amended on December 21, 1993]

2.06. "Designated Waste"

A. is mixed municipal solid waste generated in the County and destined for in-state disposal, excluding hazardous waste, infectious waste, and undesignatable waste; and

B. is mixed municipal solid waste generated in the County and destined for out-of-state disposal excluding hazardous waste, infectious waste, and undesignatable waste.

APPENDIX G

MEMORANDUM

TO: James Bourey, Hennepin County Administrator

FROM: Pat Diamond, Deputy County Attorney

DATE: December 9, 1993

RE: Designation

Attached please find a copy of language which was proposed and which we referred to in our meeting yesterday morning. Amending the ordinance to change the definition of designated waste to distinguish between in-state and out-of-state disposal would allow the provisions to be severable in the event designation over out-of-state disposal is found unconstitutional. This language, together with simultaneously issuing a letter suspending the enforcement of designated waste destined for disposal outside the state of Minnesota, would put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time. (Proposed letter also attached.)

The County policy on enforcement would then involve enforcement activity against haulers disposing of waste in-state but in violation of our designation ordinance (i.e. not at HERC or Elk River). Enforcing designation on in-state waste is not without risk. The risk we run is that a judge would declare the entire designation ordinance unconstitutional. The basis for doing so would be that *any* designation (in-state or out-of-state) has an impermissible effect on in-state commerce. There is no case law directly on point concerning the "in-state commerce clause" challenge. The risk involved is, however, probably preferable to suspending enforcement of both in-state

and out-of-state disposal, resulting in the County losing the waste altogether, to long-term hauler contracts.

PD:ln
Attachment

cc: Vern Genzlinger
Janet Leick

[Proposed Letter Not in Record Before the Court of Appeals; Letter Not Produced by County in Discovery]

FILED
NOV 6 1997
CLERK

(2)

No. 97-605

In the
Supreme Court of the United States
October Term, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

1. Do customers of garbage haulers have standing under the dormant Commerce Clause to challenge a flow control ordinance that regulates only garbage haulers and to recover damages for disposal costs passed on by garbage haulers?

2. Was it error for the court of appeals to hold that restrictions on in-state disposal of solid waste generated in-state do not discriminate against interstate commerce and must be reviewed under the Pike balancing test?

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Respondent Hennepin County opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on June 9, 1997 (petition for rehearing with suggestion for rehearing en banc denied July 10, 1997).

STATEMENT OF THE CASE

The relevant background of this case is set forth in detail in the court of appeals' decision, Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997) (Petition Appendix ("Pet. App.") A). The following facts are provided to correct inaccuracies and omissions in Petitioners' Statement Of The Case.

This consolidated matter involves two actions, Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, No. 4-94-63 (D. Minn. filed Jan. 20, 1994), and Robinson Rubber Products Co., Inc. et al. v. Hennepin County, No. 4-95-220 (D. Minn. filed April 3, 1995), both of which allege that Hennepin County Ordinance 12 discriminates against interstate commerce in violation of the dormant Commerce Clause. Ordinance 12 is a "flow control" or "designation" ordinance which regulated the disposal of Hennepin County, Minnesota mixed municipal solid waste both within Minnesota ("intrastate designation") and, for a shorter period of time, outside of Minnesota ("interstate designation").

Although the claims in the two actions are virtually identical, the petitioners (plaintiffs below) are distinct and differently situated. The Oehrleins petitioners include several Minnesota garbage haulers, one Minnesota landfill and one Iowa landfill. The Robinson Rubber petitioners are Hennepin County customers of garbage haulers, also referred to as waste "generators."

Petitioners challenge two aspects of the court of appeals' decision. The Robinson Rubber petitioners alone challenge the court of appeals' ruling that customers of garbage haulers do not have standing under the Commerce Clause to challenge Ordinance 12. The Oehrleins and Robinson Rubber petitioners both challenge the court of appeals' ruling that intrastate designation under Ordinance 12 does not discriminate against interstate commerce and, therefore, must be reviewed under the Pike balancing test.[1]

A. Facts Relevant To This Court's Consideration Of Standing And Proceedings Below.

1. Facts.

Ordinance 12 regulates the activities of garbage haulers, not of the customers of garbage haulers. "This Ordinance shall govern the transportation and disposal of all Designated Waste generated or disposed of within the County, as required by State law, and all Haulers and other Persons engaged in transportation or disposal of Designated Waste within the County." Ordinance 12, § II, subs. 1 (Pet. App. 90a) (emphasis added).

The Ordinance defines other "Persons" to include "Designated Waste generators." Ordinance 12, § I, subs. 13 (Pet. App. 85a). However, as the context in which the term "other Persons" is used makes clear, the Ordinance regulates

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[1] See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

waste "generators" only when they are "engaged in transportation or disposal" of designated waste.[2]

"Other Persons" are "engaged in transportation or disposal" of designated waste only when they "deliver" their own garbage to a designated facility. In the context of the Ordinance, delivery means the act of transporting waste to a designated facility and offering it for processing.[3]

The Robinson Rubber petitioners do not deliver their own garbage to designated facilities. The conditionally certified class represented by the Robinson Rubber petitioners is defined as:

> All residential and commercial generators of mixed municipal solid waste in Hennepin County who directly paid for waste removal at any time during the period June 1, 1989 to the present.

(Pet. App. 65a) (emphasis added). The Robinson Rubber petitioners hire commercial garbage haulers to collect and

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[2] "Disposal" is not defined in the Ordinance. However, the Minnesota Waste Management Act, with which Ordinance 12 is intended to comply, defines "disposal" and "dispose" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste into or on any land or water . . . ." Minn. Stat. § 115A.03, subd. 9.

[3] See Ordinance 12, § IV, subs. 1 (Pet. App. 101a) ("Each Person shall use its best efforts to deliver only Acceptable Waste to the Facility"); Id. (the "obligation of each Person not to deliver Unacceptable Waste to the Facility shall not be limited by any inspection of such Person's vehicle by the County"); Id. (if the County finds Unacceptable Waste in a person's vehicle, "the Person delivering such delivery shall forthwith remove such entire delivery from the Facility for proper disposal elsewhere. All costs of such removal and disposal shall be borne by each Hauler"); see also Ordinance 12, § IV, subs. 2 (Pet. App. 101a-102a) (listing "Delivery Conditions" with which each "Person" must comply); Ordinance 12, § V, subs. 1 (Pet. App. 107a) ("Each Hauler or other Person who delivers Waste to the Facility must pay a Tipping Fee").

remove garbage from their homes and businesses. See Appellant's Appendix in the Court of Appeals ("Aplnt. App.") at 395, ¶ 30 (Complaint, alleging, "At all relevant times, the members of Plaintiff Class have contracted with haulers for the disposal of their County Waste, or have been charged by the municipality in which they reside for the removal of their County Waste").

Once the garbage leaves the curb, the commercial haulers "own" the garbage, Ordinance 12, § 3, subs. 3.07 (Aplnt. App. 144), and exercise exclusive control over its disposal. The commercial haulers, not their customers, paid the tipping fees at the designated waste processing facilities. Ordinance 12, § V, subs. 1 (Pet. App. 107a); Ordinance 12, § I, subs. 15 (Pet. App. 85a); Appellees' Appendix in the Court of Appeals ("Aplee. App.") 146.

The Robinson Rubber petitioners allege they were injured because their garbage bills were higher than they would have been in the absence of Ordinance 12. Their garbage bills were inflated, Petitioners allege, because Ordinance 12 required haulers to deliver waste to designated facilities, where the tipping fees that haulers paid generally were higher than tipping fees charged by competing landfills. Some haulers passed on to some customers an indeterminate amount of the haulers' increased disposal costs which, for some customers, resulted in higher garbage bills.[4]

This indirect effect on consumer garbage bills was not unexpected. Since the tipping fee was intended to fund the relatively high cost of waste processing as well as the County's recycling and other environmental programs,

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[4] For some Petitioners, the alleged pass-through of disposal costs also filtered through the municipalities in which they live. These municipalities, including the City of Minneapolis, either use municipal employees or contract with haulers for the collection and removal of all residents' garbage. Haulers bill the municipalities which, in turn, tax or otherwise charge residents to pay for the services.

Hennepin County understood that the tipping fees it charged generally would be higher than tipping fees that landfills charged. The County anticipated that many haulers would not absorb all of their increased disposal costs and, in many cases, would attempt to pass on at least some of the costs to their customers.[5] Nevertheless, Hennepin County did not require haulers to pass on disposal costs. Haulers were free to exercise their independent business judgments regarding whether to pass on disposal costs.

2. Proceedings Below.

Hennepin County moved to dismiss on the grounds that the Robinson Rubber plaintiffs did not satisfy Article III standing requirements and did not fall within prudential limitations on standing. The district court denied Hennepin County's motion and granted partial summary judgment in favor of plaintiffs, holding that plaintiffs had standing because they were "direct participants" in the market for waste processing services.

The court of appeals reversed. It held that the Robinson Rubber plaintiffs satisfied the minimal standing requirements of Article III, but did not fall within prudential limitations on standing. The court of appeals found that Ordinance 12 regulated waste haulers, not waste generators such as plaintiffs, and that plaintiffs were seeking to assert the constitutional rights of haulers to challenge the Ordinance. Consequently, plaintiffs' claims were barred by the third-party standing doctrine articulated in Warth v. Seldin, 422 U.S. 490 (1975). In addition, the court of appeals found that these

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[5] Hennepin County viewed this indirect economic consequence of flow control as a benefit because it made plain the correlation between waste volume and garbage bills and, consequently, encouraged waste generators to reduce and recycle.

plaintiffs' interest in lower garbage bills, as mere consumers at the end of a chain of commerce affected by Ordinance 12, was not within the zone of interests protected by the Commerce Clause.

B. Facts Relevant To This Court's Consideration Of Intrastate Designation And Proceedings Below.

1. Facts.

When Ordinance 12 first took effect in 1989, it required garbage haulers to deliver non-exempt, unprocessed mixed municipal solid waste generated in Hennepin County, Minnesota ("designated waste") to waste processing facilities designated by Hennepin County, or to waste processing facilities excluded or exempt from the Ordinance.[6] By negative implication, Ordinance 12 prohibited disposal of designated waste at all other facilities both within Minnesota and outside Minnesota.[7]

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[6] Exempt facilities included all processing facilities, in- and out-of-state, which existed when the Hennepin County designation plan was approved in 1985, two privately-operated processing facilities exempted by the Metropolitan Council (a regional agency created by the Minnesota legislature to coordinate planning and development in the seven-county Minneapolis-St. Paul metropolitan area), as well as facilities that applied directly to Hennepin County for exclusion. One of the Oehrleins plaintiffs, Knutson Services, Inc., received an exclusion from Hennepin County.

[7] As a practical matter, when the Ordinance first took effect it directed to designated or exempted/excluded facilities Hennepin County waste that otherwise would have been landfilled in Minnesota landfills, not in out-of-state landfills. Prior to the implementation of flow control, little if any Hennepin County waste was transported out-of-state. The interstate market for Hennepin County solid waste did not develop until the early to mid-1990s. Thus, contrary to Petitioners' allegation, Hennepin County did not "anticipate[] a direct impact on the generators' access to out-of-state markets . . . ." Petitioners' Petition at 5.

In December 1993, in light of the fact that this Court recently had granted certiorari in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994), the Hennepin County Board passed a resolution suspending enforcement of all restrictions on the disposal of designated waste outside Minnesota. Consistent with Minn. Stat. § 473.848, which prohibits disposal of unprocessed Hennepin County and other Twin Cities metropolitan area waste in in-state landfills, Hennepin County continued to enforce Ordinance 12's restrictions on disposal of designated waste within Minnesota. In addition, the County Board bifurcated the definition of "designated waste," formalizing a distinction between waste destined for disposal within and outside Minnesota, to facilitate severability in the event of an adverse ruling on interstate designation.

Once the County suspended enforcement of interstate designation, certain haulers -- including Oehrleins plaintiffs Randy's Sanitation, Inc. and Gallagher's Service, Inc. -- immediately began shipping Hennepin County waste outside Minnesota. Ben Oehrleins and Sons and Daughter, Inc. et al. v. Hennepin County, 922 F. Supp. 1396, 1401 (D. Minn. 1996) (Pet. App. B) (noting "undisputed evidence that several [hauler] plaintiffs did ship waste out-of-state as soon as enforcement was suspended"); see also Oehrleins, 115 F.3d at 1386 ("It is beyond dispute that the 1993 suspension of interstate enforcement allowed waste to flow freely to out-of-state processors . . .").

2. Proceedings Below.

The district court found that both interstate and intrastate designation under Ordinance 12 discriminated against interstate commerce. Applying strict scrutiny, the district court held that both aspects of the Ordinance violated the dormant Commerce Clause, and granted partial summary

judgment in favor of the plaintiffs in both Oehrleins and Robinson Rubber.

The court of appeals affirmed the district court's holding that interstate designation under Ordinance 12 discriminated against interstate commerce in violation of the dormant Commerce Clause,[8] but reversed the district court's holding that intrastate designation discriminated against interstate commerce and was subject to review under strict scrutiny. The court of appeals remanded to the district court to review intrastate designation under the Pike balancing test, which will determine whether the putative benefits of intrastate designation under Ordinance 12 are clearly outweighed by the burdens, if any, on interstate commerce. This determination on remand is pending.

REASONS FOR DENYING THE WRIT

A writ of certiorari is unwarranted. The court of appeals' decision is entirely consistent with this Court's precedents and with the decisions of the other courts of appeals. Review would serve no purpose other than to examine and weigh evidence, discuss specific facts, and construe and interpret the language of Ordinance 12. This Court does not sit for such purposes. Texas v. Mead, 465 U.S. 1041, 1043 (1984).

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[8] Contrary to Petitioners' statement, Hennepin County has not "admitted" any violation of the Commerce Clause. See Petitioners' Petition at 2. Hennepin County has filed a conditional cross-petition seeking review of the court of appeals' holding that interstate designation under Ordinance 12 discriminated against interstate commerce in violation of the dormant Commerce Clause.

I. THE COURT OF APPEALS' STANDING DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS.

A. Consistent With This Court's Decision In Warth, The Court Of Appeals Properly Applied The Third-Party Standing Doctrine To The Unique Facts Of This Case.

The court of appeals concluded that the third-party standing doctrine bars Petitioners' claims based on its finding that Ordinance 12 regulates garbage haulers, not customers of garbage haulers such as Petitioners.[9] Haulers who choose to dispose of garbage out-of-state may be engaged in interstate commerce allegedly adversely affected by Ordinance 12, but their customers are not. Petitioners are merely local consumers whose complaint is that they paid "higher garbage bills due to the passed-on costs incurred by the haulers under the Ordinance. . . . Any relief due the generator plaintiffs turns on the rights of the *haulers* to be free of the Ordinance's designation requirements." Oehrleins, 115 F.3d at 1381 (emphasis in original).

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[9] Petitioners state that the third-party standing doctrine was the court of appeals' "alternative reason for denying standing . . . ." Petitioner's Petition at 12. In fact, the third-party standing doctrine was the court of appeals' first-stated reason for denying standing. Oehrleins, 115 F.3d at 1380-81. Therefore, Hennepin County addresses this rationale first.

1. A Writ Of Certiorari Is Inappropriate Because It Would Entail Detailed Review Of The Facts.

Petitioners' argument that the court of appeals' decision conflicts with this Court's precedents turns on whether the factual basis for the court of appeals' decision is sound. Petitioners contend that the court of appeals misconstrued and misinterpreted Ordinance 12 to regulate garbage haulers, as opposed to Petitioners, which led the court of appeals to misapply the third-party standing doctrine in conflict with this Court's precedents.

To review the issues presented by Petitioners, this Court must construe Ordinance 12 and evaluate and weigh the specific facts of this case. For this reason alone, a writ of certiorari is inappropriate. See Texas, 465 U.S. at 1043. In addition, neither the premise nor the conclusion of Petitioners' argument has merit.

2. A Writ Of Certiorari Is Not Warranted Because The Court Of Appeals' Decision Is Factually Sound And Does Not Conflict With This Court's Precedents.

a. The Court Of Appeals' Decision Is Factually Sound.

In their attempt to construct a conflict with this Court's decisions where none exists, Petitioners seriously mischaracterize Ordinance 12. Petitioners disingenuously assert that, as waste generators, they are a "regulated class" under Ordinance 12, Petitioners' Petition at 3, which was "forbidden, on pain of penalties, from contracting with waste haulers to dispose of their waste at any out-of-state facility." Id. at 5.

Petitioners' assertion is premised on a selective reading of the Ordinance and dubious logic. Petitioners argue that because Ordinance 12 regulates "other Persons," and "Person" is defined to included waste "generators," Ordinance 12 regulates Petitioners. Id. The fallacy of Petitioners' argument is obvious. Ordinance 12 does not regulate "other Persons" per se; it regulates "all Haulers and other Persons engaged in the transportation or disposal of" designated waste. (Pet. App. 90a); see Oehrleins, 115 F.3d at 1379 n.6 (rejecting plaintiffs' argument that Ordinance 12 regulates them because "Person" is defined to include "generators").

"Other Persons" are "engaged in the transportation or disposal" of designated waste when they deliver it to a designated facility. See Ordinance 12, § IV, subs. 1 (Pet. App. 101a); § IV, subs. 2 (Pet. App. 101a-102a). Thus, "generators" are subject to the Ordinance only when they deliver their own garbage to a designated facility.

While Petitioners may be waste "generators" in the sense that they "generate" or create garbage, they are not "generators" in the limited sense that the term is used in Ordinance 12. Petitioners place garbage in a can, and put the can on the curb for collection and removal by a commercial garbage hauler. As the court of appeals found, Petitioners are "consumers of waste disposal services supplied by garbage haulers . . . ." Oehrleins, 115 F.3d at 1380.

It distorts Ordinance 12 beyond all reason to suggest, as Petitioners do, that the Ordinance subjects customers of garbage haulers to any duties, obligations or "pain of penalties." Petitioners presented absolutely no evidence that they exercise any control over, have any obligations for, or suffer any penalty because of, the disposal of their garbage. Once the garbage leaves the curb, haulers own the garbage. Ordinance 12, § 3, subs. 3.07 (Aplnt. App. 144). Haulers alone are responsible for disposal, including payment of tipping fees at designated facilities. Ordinance 12, § V, subs.

1 (Pet. App. 107a); Ordinance 12, § I, subs. 15 (Pet. App. 85a); Aplee. App. 146.

Although Hennepin County anticipated that many haulers would attempt to pass on their costs of operation, including tipping fees, to their customers, Hennepin County never directed or required haulers to pass on their costs of complying with Ordinance 12. Haulers, exercising their independent business judgments, made individual decisions whether to pass on their costs and, if so, to which customers and in what amounts.

As the court of appeals found, Petitioners' alleged injury -- payment of garbage bills that were higher than they would have been if haulers had not been required to dispose of designated waste at designated facilities -- is the "economic consequence of the County's restriction of where haulers may deliver waste." Oehrleins, 115 F.3d at 1381. Petitioners sued as consumers to recover passed-on costs incurred by haulers to comply with the haulers' obligations under Ordinance 12.

b. The Court Of Appeals' Decision Does Not Conflict With This Court's Precedents.

The unique facts on which the court of appeals based its decision distinguish this case from the decisions of this Court which Petitioners maintain are offended, and bring this case in line with Warth, supra, which Petitioners maintain is irrelevant. None of the decisions which Petitioners suggest "conflict" with the court of appeals' decision even addresses the third-party standing doctrine. Unlike Petitioners, the plaintiffs in the decisions to which Petitioners cite were themselves subject to the challenged regulations. Therefore, there is no direct conflict, nor conflict in principle, between the court of appeals' decision and this Court's precedents.

General Motors Corp. v. Tracy, 117 S.Ct. 811 (1997), one of the cases to which Petitioners point, involved a

challenge to an Ohio statute which imposed a sales tax on purchases of natural gas, but exempted purchases from in-state utilities. General Motors, which purchased virtually all of its natural gas from out-of-state vendors and paid the sales tax, challenged the statute under the Commerce Clause. This Court held General Motors was subject to the statute and thus had standing because it was assessed the discriminatory tax. Standing obtains "where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers." Tracy, 117 S.Ct. at 818.

As the court of appeals noted in this case, because the Robinson Rubber plaintiffs are not liable for payment of tipping fees at designated facilities, they are not comparable to General Motors in Tracy. Indeed, the Robinson Rubber Petitioners are at least one step further down the chain of commerce and causation, in a position comparable to customers of General Motors who ultimately might bear the cost of the tax subsumed in higher truck prices. Oehrleins, 115 F.3d at 1381. General Motors customers were not, and could not have been, plaintiffs in Tracy. Therefore, Tracy is inapposite and does not conflict with the court of appeals' decision in this case.

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), is nearly identical to Tracy. Bacchus involved a Hawaiian statute which imposed a 20 percent excise tax on sales of liquor wholesale, but exempted certain liquors produced in-state. Although the tax discriminated against out-of-state liquor producers, the in-state wholesalers had standing because "wholesalers are . . . liable for the tax. Although they may pass it on to their customers, and attempt to do so, they must return the tax to the State whether or not their customers pay their bills." Bacchus, 468 U.S. at 267.

The liquor wholesalers in Bacchus are comparable to the haulers in this case, not to the Robinson Rubber petitioners.

Although the haulers may attempt to pass on their costs to their customers, the haulers must pay the tipping fees regardless of whether their customers pay their bills. The Robinson Rubber petitioners are comparable to the customers of the liquor wholesalers in Bacchus. The customers of the liquor wholesalers were not plaintiffs in Bacchus; consequently, the third-party standing doctrine did not come into play. Thus, Bacchus also is inapposite.[10]

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 117 S.Ct. 1590 (1997), presents only a slightly different situation. Camps involved a Maine statute which exempted charitable institutions from real estate taxes, except when the institution was operated principally for the benefit of non-residents. A non-profit Maine summer camp, which attracted 95 percent of its campers from out-of-state and which was denied the real estate tax exemption, challenged the statute.

The standing of the plaintiff to sue under the Commerce Clause was not directly at issue in Camps. Instead, the defendant argued that the dormant Commerce Clause was not implicated because the camp's services were consumed entirely within Maine. This Court rejected the argument, noting that the camp was engaged in interstate commerce both as a purchaser and as a provider of goods and services because it marketed those services to out-of-state campers. Camps, 117 S.Ct. 1596.

Petitioners in this case argue that the court of appeals should not have applied the third-party standing doctrine to bar their claims because here, as in Camps, Petitioners are

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[10] If Petitioners' reasoning were correct, GM truck buyers in Tracy, customers of liquor stores in Bacchus, and every other customer of a party subject to a discriminatory regulation would have standing to assert a Commerce Clause challenge. The third-party standing prudential limitation would be no limitation at all.

purchasers of services and, thus, engaged in interstate commerce in their own right. The analogy does not fit.

Unlike the Maine camp and its out-of-state campers, Petitioners are not parties to the transaction in interstate commerce which is allegedly adversely affected by the challenged regulation. Petitioners place their garbage in can, put the can on the curb at their homes and businesses, pay a local hauler to collect the garbage, and wash their hands of it. Petitioners play no part in the subsequent transactions between haulers, who own and control the collected garbage, and out-of-state disposal facilities.[11]

Even if Petitioners somehow could be construed to be "engaged in interstate commerce" when they put their garbage cans on the curb for removal, they are not parties to the critical transaction -- the only transaction regulated by Ordinance 12 -- between hauler and disposal facility. The third-party standing doctrine applies to Petitioners because, unlike the Maine camp, they are not subject to the challenged regulation; any relief which Petitioners might claim turns on the rights of haulers to be free of regulation. Therefore, the court of appeals' decision also is consistent with Camps.[12]

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[11] Thus, Petitioners are unlike the hypothetical out-of-state waste "generators" referred to in Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992), who were presumed to arrange disposal at the plaintiff landfill. Id. at 359. The hypothetical Fort Gratiot "generators" are comparable to haulers in this case.

[12] Contrary to Petitioners' allegations, the court of appeals' decision also does not conflict with Bennett v. Spear, 117 S.Ct. 1154 (1997), Fort Gratiot, supra; Wyoming v. Oklahoma, 502 U.S. 437 (1992); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977); Boston Stock Exchange, et al. v. State Tax Commission, et al., 429 U.S. 318 (1977), nor with Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992), cert. denied 506 U.S. 1053 (1993). None of these cases to which Petitioners cite even discusses the third-party standing doctrine, and none involves consumer standing. In each case, the plaintiff's connection with the regulated transaction went far beyond the indirect harm

c. The Court Of Appeals' Decision Is Controlled By This Court's Decision in Warth.

Petitioners cite only one case, Warth, supra, which addresses the third-party standing doctrine. Petitioners do not suggest that the court of appeals' decision conflicts with Warth. Nor do Petitioners argue that the court of appeals misconstrued Warth. Instead, Petitioners argue that "[t]he court of appeals' Warth v. Seldin third-party standing analysis is . . . plainly irrelevant," Petitioners' Petition at 17, because the court of appeals erred factually in determining that customers of garbage haulers are not subject to Ordinance 12. As noted above, this is not the type of alleged error which is appropriate for review by this Court.

Moreover, notwithstanding Petitioners' casual dismissal of Warth as "irrelevant," the court of appeals' analysis is applicable and unerring. In Warth, several groups of plaintiffs challenged city zoning ordinances that allegedly barred development of low-income housing. One group of plaintiffs

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to personal consumer finances alleged by Petitioners. See Bennett, 117 S.Ct. at 1160 (petitioners had a competing commercial interest in waters that the government respondent declared necessary for preservation of endangered fish); Fort Gratiot, 504 U.S. at 357 (standing not challenged; waste import restrictions prevented plaintiff landfill from receiving out-of-state waste); Wyoming, 502 U.S. at 448-49 (the State's sovereign interest threatened by statute which deprived Wyoming of specific tax revenues); Hunt, 432 U.S. at 345 (plaintiff alleged a direct injury attributable to challenged statute); Boston Stock Exchange, 429 U.S. at 320 n.3 (New York's higher tax on out-of-state securities sales diverted sales from plaintiff out-of-state stock exchanges to New York exchanges); Government Suppliers Consolidating Services, 975 F.2d at 1274 (standing not challenged; ban on backhaul of solid waste would cause "undisputed . . . severe adverse effects" on business of plaintiff broker of backhauling services that arranged for others to backhaul).

was comprised of residents of a neighboring community who alleged that they suffered "economic injury consequent to" the city's alleged discriminatory practices. Warth, 422 U.S. at 508. This Court held that these plaintiffs' claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Id. at 509.

As the court of appeals found, the injury claimed by Petitioners is of the same sort. Petitioners are not regulated by Ordinance 12, do not pay and are not liable for tipping fees at designated facilities, and are not parties to any interstate transaction allegedly adversely affected by Ordinance 12. Plaintiffs' claimed injury is that -- as customers of parties to an interstate transaction allegedly adversely affected by Ordinance 12 -- the garbage bills they paid were higher because haulers passed on the haulers' costs of complying with Ordinance 12. Oehrleins, 115 F.3d at 1381.

Here, as in Warth, Petitioners claim that they suffered economic injury consequent to the County's alleged discriminatory regulation of others. Id. Because Petitioners are seeking to assert the constitutional rights of haulers, Petitioners' claims "fall within the third-party standing doctrine described in Warth." Id.

B. Consistent With This Court's Precedents, The Court Of Appeals Properly Applied The Zone Of Interests Rule To The Unique Facts Of This Case.

Petitioners' contention that the court of appeals' decision "eviscerated" this Court's decision in Dennis v. Higgins, 498 U.S. 439 (1991), misconstrues both the court of appeals' decision and this Court's decision. Contrary to Petitioners' assertion, the court of appeals neither held nor implied that the Commerce Clause was not designed to benefit individuals. Nor did the court of appeals hold or imply that a plaintiff must

invariably allege a direct burden or injury to satisfy the zone of interests test. The court of appeals held that consumers, whose only alleged injury is that they have shouldered an "end-line burden" such as higher garbage bills due to costs passed down through the chain of commerce, do not assert an interest that even arguably falls within the zone of interests protected by the Commerce Clause. Oehrleins, 115 F.3d at 1382. This decision does not conflict with Dennis.

The petitioner in Dennis was an Ohio motor carrier which challenged motor carrier taxes imposed by Nebraska on vehicles registered in other states and operated in Nebraska. The petitioner's standing was not at issue. The question presented to this Court was whether the Commerce Clause confers rights that individuals may vindicate by bringing suit under § 1983.

This Court held that the Commerce Clause does confer rights that may be vindicated under § 1983 because the Commerce Clause was "intended to benefit those who, like petitioner, are engaged in interstate commerce." Dennis, 498 U.S. at 449. In support of its conclusion, this Court quoted Justice Jackson's characterization of the purposes of the Commerce Clause, including the passage, "Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any." Id. at 449-50 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949)).

Petitioners seize on this snippet to argue that, merely by virtue of their status as consumers, their claims fall within the zone of interests protected by the Commerce Clause. However, as the context makes clear, the passage does not support Petitioners' argument.

As this Court stated in introducing the H.P. Hood passage, the Commerce Clause was "intended to benefit those who . . . are engaged in interstate commerce." Id. at 449 (emphasis added). At most, the Dennis and H.P. Hood dicta

suggest that there may be circumstances in which consumers are "engaged in interstate commerce" and thus protected by the Commerce Clause.[13] However, those circumstances are not found in this case. As the court of appeals found, Petitioners are customers of parties involved in disposal transactions that are affected by a regulation that allegedly discriminates against interstate commerce. Oehrleins, 115 F.3d at 1380-81. Petitioners themselves are not "engaged in interstate commerce" that is allegedly adversely affected by a regulation that discriminates against interstate commerce. They are merely consumers who at most shoulder the "end-line burden" of costs haulers incur to comply with Ordinance 12 and pass on down through the chain of commerce.

This Court did not hold in Dennis, and never has held, that persons come within the zone of interests protected by the Commerce Clause merely by virtue of their status as ultimate consumers. In fact, this Court has refused to extend standing to indirect consumers in the antitrust context. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-38 (1977) (indirect purchasers suing to recover under a pass-on theory do not have standing to assert antitrust claims). Therefore, the court of appeals' decision that Petitioners, as mere consumers, do not fall within the zone of interests protected by the Commerce Clause is consistent with this Court's precedents.[14]

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[13] The H.P. Hood passage also may be read as merely recognizing that consumers are ultimate beneficiaries of the free flow of commerce across state lines, not that consumers have actionable rights under the dormant Commerce Clause.

[14] The court of appeals' decision also is consistent with the Ninth Circuit Court of Appeals' decision in Individuals for Responsible Gov't, Inc. v. Washoe County, 110 F.3d 699 (9th Cir. 1997), petition for certiorari filed, 66 U.S.L.W. 3157 (U.S. Aug. 1, 1997) (No. 97-269), a case which the court of appeals cited as analogous. See Oehrleins, 115 F.3d at 1382. The plaintiffs in Washoe County were not within the zone of interests protected by the Commerce Clause because even though there was a direct causal link between their alleged injury -- being forced to pay for unwanted garbage

In addition, while this Court consistently has interpreted the dormant Commerce Clause to protect out-of-state interests unrepresented in the local political process, it never has interpreted the dormant Commerce Clause to protect local residents from the effects of local regulations imposed by their own elected officials. If the Robinson Rubber petitioners feel burdened by Ordinance 12, they have a political remedy. Cf. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 187 (1938) (fact that the burden of local regulation falls on in-state interests helps insure that a state's political processes will serve as a check against unduly burdensome regulation).

Local consumers such as Petitioners are excluded from the zone of interests protected by the Commerce Clause for good reason. To extend the protection of the Commerce Clause to all chain-of-commerce consumers, as Petitioners urge, would have extraordinary consequences. Every consumer who could allege de facto causality between higher consumer costs and an unconstitutional regulation that allegedly adversely affected some transaction in the chain of commerce would have a cause of action under the Commerce Clause. Contrary to Petitioners' argument, principles of foreseeability and proximate cause would not prevent an unbounded expansion of such lawsuits because it is assumed that parties actually engaged in interstate commerce pass on some part of their costs to consumers. See Bacchus, 468 U.S. at 267.

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services -- and enactment of the challenged statute, there was no link between the alleged injury and the alleged barrier to interstate commerce. Washoe County, 110 F.3d at 703-04. Similarly, in this case, regardless of whether there is a causal link between Petitioners' payment of higher garbage bills and enactment of Ordinance 12, there is no link between the alleged injury and the alleged burden on interstate commerce because Petitioners are not parties to the allegedly burdened interstate transaction between haulers and out-of-state landfills.

C. The Court Of Appeals Did Not Subvert Legal Principles To Avoid Outrageous Implications Of Petitioners' Standing Argument.

Petitioners' final standing argument is not worthy of this Court's review because the alleged "conflict" that it misidentifies arises from a mere observation -- neither a finding, nor a holding nor even dicta -- in the court of appeals' opinion. Moreover, the court of appeals' observation does not conflict with this Court's decisions, and Petitioners' wild speculation as to the intent and effect of the court of appeals' observation is without foundation.

At the conclusion of its decision on standing, the court appeals made the observation, in a footnote, that it was "mindful that granting standing to consumers bearing passed-on costs in Commerce Clause cases could have serious repercussions on state and local governments' ability to enact economic regulations." Oehrleins, 115 F.3d at 1382 n.9. This observation is an extension of the court's discussion regarding the implications of Petitioners' argument: "Again, if the ultimate cost of economic regulation to consumers were within the zone of interests of the Commerce Clause, then every consumer could properly challenge such regulations." Id. at 1382. Both comments go to show the unprecedented, unsupported and incredible nature of Petitioners' argument.[15]

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[15] Although the potential financial consequences of this lawsuit are staggering (Petitioners claim in excess of $150 million in damages), there is nothing in the footnoted observation which would suggest, as Petitioners do, that the court of appeals adopted the rationale that financial consequences of an unconstitutional act justify withholding relief. As its decision makes abundantly clear, the court of appeals "withheld relief" from Petitioners because Petitioners lack standing. See Oehrleins, 115 F.3d at 1379-82. Therefore, the court of appeals' decision does not conflict with McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).

There is nothing improper about the court of appeals' observation. A court should be "mindful" of the implications of the arguments presented to it. To consider the implications of an argument is one way to test its validity: if the implications are outrageous, so too might be the argument itself. Cf. Illinois Brick, 431 U.S. at 737-41 and 741 n.24 (discussing potential implications of allowing indirect purchasers to recover using pass-on theories in antitrust cases).

To be "mindful" of, and to comment on, outrageous implications of Petitioners' standing argument does not suggest, in any way, that the court of appeals subverted legal principles to avoid the outrageous implications. The court of appeals' holding is solidly grounded and supported in the full opinion.

II. THE COURT OF APPEALS' DECISION THAT INTRASTATE DESIGNATION DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND SHOULD BE REVIEWED UNDER THE PIKE BALANCING TEST IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS.

A. The Court Of Appeals Did Not Disregard Evidence Of Discriminatory Purpose And Effect.

Petitioners drop all pretense that there is a conflict with this Court's decisions in arguing that the court of appeals "disregarded" evidence of discriminatory purpose and effect in determining that the intrastate application of Ordinance 12 should be reviewed under the Pike balancing test. Petitioners would have this Court play the role of fact-finder, evaluating

and weighing the evidence, and reject the court of appeals' judgment.[16] For this reason alone, the issue presented is not worthy of review by this Court. In addition, Petitioners' argument is without foundation.

The court of appeals did not "disregard" any evidence of alleged discriminatory purpose and effect presented to it. As the court of appeals' opinion shows, the court carefully considered the evidence presented and found it unconvincing. The court of appeals examined and discussed in detail Petitioners' contention that Hennepin County's suspension of interstate designation, and the alleged implied threat that enforcement might be resumed, discriminated against interstate commerce in purpose.

> The plaintiffs have produced no evidence that the Ordinance has had such an effect, nor is there any evidence that the County intended the Ordinance to have such an effect. It is beyond dispute that the 1993 suspension of interstate enforcement allowed waste to flow freely to out-of-state processors, while working a comparative disadvantage to local entities. This hardly shows a purpose to discriminate against out-of-state concerns.

Oehrleins, 115 F.3d at 1386.

The court of appeals also specifically considered and rejected Petitioners' contention that a deputy county attorney's memorandum, which discusses the potential

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[16] Petitioners implicitly concede the fact-bound nature of this issue when they argue in the concluding section of the petition that when "faced with conflicting evidence as to the [discriminatory] purpose or effect," the court of appeals should have remanded to permit the district court to determine whether a discriminatory purpose or effect existed. See Petitioners' Petition at 25.

consequences of the suspension of interstate designation, evidences a discriminatory purpose.

> In trying to show a discriminatory purpose, the plaintiffs put much weight on a memorandum from a deputy county attorney concerning the 1993 amendments to the ordinance and suspension of interstate enforcement. . . . Even if we were to impute the deputy county attorney's opinion to the County, we do not find this language as sinister as plaintiffs suggest. In our view, the memorandum reflects that, given the uncertainty of the law at the time, neither the County nor the waste haulers could anticipate what aspects of Ordinance 12 might ultimately be found valid or invalid.

Id. at 1386 n.12. The court of appeals did not imply, as Petitioners suggest, that discriminatory purpose may be found only when the government acts in "bad faith." The court simply found that the evidence did not show a discriminatory purpose.[17]

Similarly, the court of appeals considered and rejected all of the alleged discriminatory effects which Petitioners presented, including arguments that the threat of renewed enforcement of interstate designation discouraged haulers from entering into long-term contracts with out-of-state

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[17] The court of appeals' judgment in refusing to apply strict scrutiny based on the deputy county attorney's memorandum is consistent with Maine v. Taylor, 477 U.S. 131, 149 (1986) (rejecting contention that a few sentences of allegedly overt protectionist motive "convert[ed] the Maine statute into an economic protectionist measure"), and Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 471 n.15 (1981) ("We will not invalidate a state statute under the [Commerce Clause] merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry").

disposal facilities, and that intrastate designation precluded out-of-state concerns from establishing waste processing facilities in Minnesota. Id. at 1386-87. As the court of appeals noted, Petitioners "produced no evidence" of such alleged effects. Id. at 1386.[18] The other alleged discriminatory effects mentioned in Petitioners' petition, equally unsupported by evidence and meritless, were not even argued to the court of appeals; therefore, the court of appeals could not have "disregarded" them.

B. Remanding For Reconsideration Of Evidence Of Discriminatory Purpose And Effect Would Have Served No Purpose.

Petitioners' argument that the court of appeals "overstepped its authority" because it did not remand to the district court to determine whether intrastate designation was infected by discriminatory purpose or effect provides no basis for this Court to accept review. Given the procedural posture of the case, the court of appeals' decision was both within its authority and appropriate. Moreover, the court of appeals' decision does not conflict with this Court's decisions or with the decisions of any other court of appeals.

This case came to the court of appeals on the district court's grant of Petitioners' motion for summary judgment. From Petitioners' perspective, all material facts, including all evidence of alleged discriminatory purpose and effect, were before the district court. The district court evaluated this

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[18] Although the court of appeals rejected Petitioners' speculation that intrastate designation precludes out-of-state concerns from establishing waste processing facilities in Minnesota and, thus, discriminates against interstate commerce, the court acknowledged that the argument, if supported by evidence, "may be relevant to a Pike analysis . . . ." Oehrleins, 115 F.3d at 1387 n.14. Thus, on remand, Petitioners will have a second opportunity to present evidence related to this contention.

evidence and determined that it showed discriminatory purpose and effect. See Oehrleins, 922 F. Supp. at 1403-05. However, in the opinion of the court of appeals, the district court misevaluated the evidence. Upon reversing the decision of the district court, it would have served no purpose for the court of appeals to remand for the district court to reconsider evidence of discriminatory purpose and effect.

In this respect, Chambers Medical Technologies of South Carolina, Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995), and Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3rd Cir. 1995), cert. denied 116 S.Ct. 1265 (1996), are inapposite. In Chambers, the Fourth Circuit Court of Appeals remanded because it was "unable to determine from the record whether the district court resolved the question of discriminatory purpose against [the defendant] or whether it simply failed to address the question . . . ." Chambers, 52 F.3d at 1262. Similarly, in Harvey & Harvey, the Third Circuit remanded for determination of issues which the district courts had failed to consider. Harvey & Harvey, 63 F.3d at 791. In contrast, the district court in this case clearly had considered and resolved, albeit wrongly, the questions of discriminatory purpose and effect.

The only pertinent issue which the district court did not address in the first instance is whether the putative benefits of intrastate designation are clearly exceeded by its burdens, if any, on interstate commerce. The court of appeals remanded this issue, Oehrleins, 115 F.3d at 1387, which is pending in the district court.[19]

If intrastate designation does not pass the Pike balancing test on remand, the issue presented to this Court -- whether

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[19] In determining that an intrastate designation ordinance is properly reviewed under the Pike balancing test, as opposed to strict scrutiny, the court of appeals' decision is consistent with the Second Circuit Court of Appeals' decision in Gary D. Peake Excavating v. Town Bd. of Hancock, 93 F.3d 68 (2nd Cir. 1996).

intrastate designation discriminates against interstate commerce -- will be moot.[20] Under these circumstances, Petitioners' petition should be denied. See Brotherhood of Locomotive Firemen v. Bangor & Aroostoock R. Co., 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court").

[20] The questions presented in Petitioner's petition also might be moot if Congress acts on proposed legislation to retroactively authorize flow control. In 1994, the House passed a flow control authorization bill, and the Senate came within one vote of authorizing flow control. Congress currently is reconsidering the issue.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 6, 1997

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NOV - 6 1997.

(3)

No. 97-605

In the
Supreme Court of the United States
October Term, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

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33 pp

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Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

MOTION OF BFI WASTE SYSTEMS OF NORTH AMERICA, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of Ben Oehrleins and Sons and Daughter, Inc, et al., and Robinson Rubber Products Co., Inc.,

et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

BFI is one of the nation's largest publicly-held companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to and despite this Court's holding in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

BFI operates a landfill in Dakota County, Minnesota. It has historically utilized that facility, or others located within Minnesota, for the disposal of wastes generated within neighboring Hennepin County. The "as enforced" Ordinance 12 precludes the Company from utilizing alternative in-state disposal facilities. BFI has filed a separate lawsuit similar to the case at bar, seeking the recovery of damages from Hennepin County. Additionally, BFI was granted leave by the Eighth Circuit to participate as an *amicus* on the petition for rehearing below.

BFI's interest in this case is, however, far broader than the specific dispute between the parties. BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by Hennepin County in this case. With all due respect to the parties to this case, BFI

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[1]Petitioners have consented in writing to this *amicus* brief. Counsel for Respondent Hennepin County has informed undersigned counsel of record that he does not consent to the filing of the *amicus* brief.

believes that its broad, national experience, and the perspective it has gained from that experience, will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

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No. 97-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the following questions, which are fairly encompassed by the Petition's third and fourth questions presented:

1. May local governments avoid this Court's holding in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) by merely "suspending" an ordinance that clearly violates the commerce clause, where the effect of the continued existence of the invalid ordinance has a significant negative effect on commerce?

2. May local governments avoid this Court's holding in Carbone by prohibiting the transport of waste to in-state, but not out-of-state, waste processing facilities that would compete with a preferred local facility, where the effect is significant discrimination against interstate commerce?

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INTEREST OF *AMICUS*

The interest of *amicus* BFI Waste Systems of North America, Inc. is set forth in the accompanying motion for leave to file this brief.[1]

REASONS FOR GRANTING THE WRIT

Since this Court's decision in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994), local governments have repeatedly attempted to circumvent the Court's ruling by requiring solid waste haulers to sign contracts obligating them to dispose of collected wastes at designated facilities, as an alternative to denial of a necessary license or permit to operate. Similarly, some jurisdictions have mandated that waste haulers abide by "economic flow control" programs, as described below, on the basis that such regimes are beyond the scope of the Carbone holding.

This case presents yet another effort to avoid the clear implications of the Court's decision in Carbone. The "as enforced bifurcated" Hennepin County Ordinance 12 essentially mandates that waste haulers that do not utilize an out-of-state disposal facility are required to deliver materials to the designated County site. BFI is directly and adversely affected by the Ordinance, as enforced. Other jurisdictions, within and outside of Minnesota, have taken the same approach, or have formally modified their local ordinances to preclude the intrastate movement of waste. Such requirements prevent the

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[1]This brief has been authored entirely by counsel for *amicus* BFI, and no other person or entity has made any monetary contribution to its preparation or submission.

efficient and environmentally protective disposal of solid waste, and contravene the Commerce Clause and this Court's decisions.

I. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES.

Hennepin County, like other political subdivisions in every state, depends upon open borders and a national economy that both provides benefits and imposes burdens. The Commerce Clause serves to ensure that those borders remain open, and that they not be closed as to some commodities, while open for others. Hennepin County has, obviously, made no effort to preclude the importation of seemingly desirable foodstuffs, manufactured goods, service equipment, etc., or the export of other locally-produced goods for sale elsewhere, but for economic reasons seeks to prohibit the export of a single commodity--waste.

The post-Carbone efforts to retain existing and impose new flow control mandates and programs despite this Court's ruling are reminiscent of other regrettable episodes in our Nation's history. The authority and duty of this Court to intervene are clear. In the absence of the Court's intercession, political subdivisions of states will engage in an unnecessary and counterproductive war of retaliation--as jurisdictions whose economies are disadvantaged due to the loss of imported waste volumes act in kind by precluding the export of their wastes. Real safety and health threats will result from continued reliance upon older, often substandard disposal sites. The goals of the

Congress in enacting RCRA and of the EPA in promulgating the Subtitle D rules will be ill-served.

Just as prohibitions on the movement of waste across state lines adversely affect the national economy, by isolating local jurisdictions from the burdens, though not the benefits, inherent in a single Union, so too do restrictions on the movement of waste between political subdivisions of a single state balkanize the marketplace. They affect--indeed, substantially so---the national marketplace by artificially distinguishing between "waste" materials and the open borders that facilitated the transportation, importation, purchase, and consumption of the "original" materials. They deprive companies such as BFI, as well as governments who construct or expand state-of-the-art facilities, of the ability to make meaningful long-term investments in disposal capacity and transportation vehicles. They disrupt regional intergovernmental efforts to improve the efficiency and environmental protectiveness of waste disposal. They artificially and dramatically increase the costs of solid waste management. And, perhaps most importantly, they constitute deliberate efforts to circumvent the goals of the Commerce Clause and this Court's numerous opinions. Review by this Court is necessary to ensure that the Commerce Clause's vital role in protecting a truly national economy is not diminished.

A. The "As Enforced Bifurcated" Ordinance Is Merely One Example of Numerous Actions Undertaken Subsequent to this Court's Holding in Carbone That Have Balkanized the Movement of Waste and Disrupted Important Regional Markets for Solid Waste Management Services

In Carbone this Court held that a flow control ordinance adopted by Clarkstown, New York, violated the Commerce Clause. By suspending "until further notice" enforcement of Ordinance 12 with regard to wastes transported to out-of-state disposal facilities, Hennepin County sought to ensure that the majority of wastes generated within the County would remain there, notwithstanding Carbone. In so doing, the County apparently concluded, and the Eighth Circuit apparently agreed, that this Court's ruling was limited to instances in which the waste hauler delivers collected materials directly to an out-of-state facility.

Unfortunately, Hennepin County's attempt to interpret Carbone in a narrow fashion to justify the retention of its flow control mandates is far from an isolated case. Whether by "as enforced" or truly "bifurcated" flow control ordinances that prohibit the delivery of waste to alternative in-state facilities, or by *de facto* flow control schemes such as so-called "market participant" franchise requirements that are essentially regulatory licensing programs, or by "economic flow control" programs that create no "legal" obligation to use a preferred facility, yet impose an economic disincentive to go elsewhere, a number of local governments have sought to undermine the Carbone holding through new or modified flow control requirements. John H. Turner, *The Flow Control of Solid Waste*

and the Commerce Clause: Carbone And Its Progeny, 7 Vill. Envtl. L.J. 203 (1996).

The decision below--by mandating that such ordinances be subject to a traditionally less-intrusive test under the Commerce Clause--will unquestionably encourage the enactment of similar provisions in other jurisdictions. The petition in this case provides an opportunity for this Court to forcefully pronounce that it meant what it said in Carbone: flow control measures violate the Commerce Clause. These measures have taken several forms.

One such form is the "franchise ordinance". Several jurisdictions outside the Second Circuit have contended that this Court's denials of certiorari in SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), cert. denied, 116 S.Ct. 911 (1996), and in USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996), immunize from Commerce Clause scrutiny franchise ordinances whose waste delivery provisions are essentially nonnegotiable, when the resulting process is virtually identical to flow control mandates created by the type of ordinance examined in Carbone. Unlike some franchise arrangements, in which the award is either for collection only and the hauler may choose the collection site, or combined collection/disposal franchises in which the hauler and community may negotiate which disposal site(s) is utilized, in these programs the franchisee has "no choice", and must indeed utilize a particular facility as a condition of the franchise.

Likewise, some local governments have sought to condition their programs by requiring that a waste hauler indicate in the franchise application its "plan for disposal" or otherwise state that it will utilize a preferred disposal facility. Various municipal

contracts for collection or recycling have included flow control provisions in instances in which no reasonable opportunity for negotiation exists, such that the hauler has no alternative but to reject outright the contract and be deprived of the "privilege" of servicing the community. In such cases, the Commerce Clause has been violated.

Similarly, "economic flow control" programs involve local governments that seek to achieve the same result as the ordinance invalidated in Carbone by reducing the "tip fee" at the "preferred" facility while making up the difference through some form of tax or fee. Such measures do not seek overtly to compel waste haulers to utilize a preferred facility; instead, they place significant economic pressure upon the haulers to do so. As several courts have recognized, economic flow control is simply ordinance flow control by another name. Both result in the same interference with protected commerce. Recent decisions in several lower courts have either strongly suggested or expressly held that certain "economic flow control" measures (for example, when the community lowers the tip fee at the public landfill and institutes a "generator fee", user fee, or revenue assessment/tax to make up for the potential revenue loss) are unconstitutional.[2]

"Economic flow control" schemes need not always result in a situation in which the former tip fee at a preferred or designated

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[2]See, e.g., West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); Mid-American Waste Sys., Inc. v. Fisher, No. C-2-94-493, slip op. (S.D. Ohio May 31, 1994); Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995); Sanifill, Inc. v. Kandiyohi County, Minn., No. C4-95-1363, slip op. (Kandiyohi County 8th Jud. Dist. Feb. 8, 1996), aff'd, 559 N.W.2d 111 (Minn. Ct. App. 1997); Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., 558 N.W.2d 288 (Minn. Ct. App. 1997), rev. granted, March 26, 1997.

facility is replaced, cent for cent, with a combination fee or tax and a reduced tip fee. But there is typically some economic incentive that is used that avoids true competition in the marketplace, and which acts to essentially "force" waste haulers to use a particular facility. Similarly, the type of "bifurcated" ordinance enforced by Hennepin County is an obvious effort to retain within a flow control system locally-generated wastes. In instances in which the local jurisdiction is not within "striking distance" of a state border, such ordinances often have their intended effect. Yet, as this Court is well aware, flow control measures, whether directly imposed as in Carbone or as implemented "through the back door", have serious, adverse consequences.

B. Flow Control Requirements Have Significant Consequences, Both Economic and Environmental

A recent study conducted by the National Economic Research Associates ("NERA") summarized the historical development of flow control mandates:

> Although flow controls have been imposed for over 20 years, they have only recently become a serious concern as the variety and accessability of alternatives has increased. The private sector responded to rapidly rising disposal costs in the mid-1980s to the early 1990s by building more disposal capacity. While the number of landfills in the U.S. has dropped rather dramatically, landfill capacity has not. In fact, capacity has been increasing in many regions of the country. As a result, disposal charges are no longer increasing, but rather falling as disposal facilities compete for business. In addition, the disparity has been exacerbated by local

> governments relying on flow control to finance recycling and other waste management programs. Local governments have imposed fees and surcharges at flow control facilities. Third, some governments became more aggressive regarding flow control as waste streams diminished at least in part because of government regulations and programs. Paper recycling, for example, has eliminated an important fuel stock from resource recovery plants.[3]

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide."[4]

Moreover, there is no demonstrated correlation between flow control and environmentally protective waste disposal, recycling, or processing. To the contrary,

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[3]National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 5.

[4]Id. at 1-2. In addition, several of the pre- and post-Carbone decisions have noted the significant and artificial economic dislocations created by flow control mandates. See, e.g., Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1387 (8th Cir. 1993) ($72 per ton disposal fee at designated facility; $30 at nearby facility); J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl Protection, 857 F.2d 913, 916 (3d Cir. 1988) (flow control resulted in $100 per ton disposal charge, as opposed to rates "approximately half" at accessible facilities), overruled by Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3rd Cir. 1995); Container Corp. of Carolina v. Mecklenburg County, No. 3:92 CV-154-MU, 1995 WL 360185 (W.D.N.C. June 22, 1992) ($37.50 per ton/$29.50 per ton).

> . . . by mandating that local waste haulers use particular management facilities, the haulers are prevented from using more environmentally sound alternatives that may exist elsewhere. The Sierra Club and other environmental groups have rightly pointed out that such regulations often inhibit the development of alternative waste management options and, in some cases, disrupt preexisting waste recovery and recycling efforts. Flow control laws unnecessarily inhibit the ability of recyclers and other ecological entrepreneurs to compete in the marketplace and provide more economical waste management options. For that reason, and because flow control has frequently been used to finance costly and inefficient incinerators, flow control is opposed by the New York Public Interest Research Group, the National Resources Defense Council, the National Wildlife Federation, Clean Water Action, and Greenpeace, among others. Those groups maintain that in practice it is likely that the environmental costs of flow control outweigh its benefits.[5]

These significant economic and environmental arguments against flow control measures are clearly applicable to most flow control programs--regardless of the method by which they were created. By selecting as the designated landfill a facility that may not, and all-too-often does not, satisfy best available landfill technology standards, local governments clearly have not sought to promote environmental protection through their flow control mandates. Flow control requirements are typically imposed for economic, not environmental, reasons. And, as the National Solid

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[5]Jonathan H. Adler, *The Failure of Flow Control*, 18 Regulation, No. 2, at 11, 13 (1995).

Wastes Management Association demonstrated in a report on flow control programs in Ohio, the requirements adopted by the state's political subdivisions have increased costs to generators and transporters of waste without providing any environmental benefit. National Solid Wastes Management Association, *The Effects of Designation and District Fees on Solid Waste Management in Ohio*, at 4, 5 (1993). The report noted that the selection of certain landfills as "designated" flow controlled facilities means that many tons of wastes are disposed of at less than state-of-the-art facilities. Moreover, the creation of county/district flow control programs in Ohio has significantly reduced inter-county and inter-district waste movements, resulting in a balkanization of the marketplace. Id.

Flow control requirements are illegal, wasteful, and counterproductive. Yet they continue despite this Court's unambiguous ruling in Carbone. The "as enforced" Hennepin County ordinance is far from isolated--it is typical of post-Carbone efforts to restrict the movement of waste. Such programs and actions balkanize waste movements. They preclude the development of regional disposal solutions, in spite of the U.S. Environmental Protection Agency's view that multi-governmental regional sites are cost-effective and more likely to be managed in an environmentally protective manner.[6] The decision below

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[6]56 Fed. Reg. 50,978, 50,989 (1991) (in issuing the Resource Conservation and Recovery Act ("RCRA") "Subtitle D" regulations applicable to municipal solid waste landfills, 40 C.F.R. Part 258, the Agency emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities.") These regulations apply to all facilities that accept waste derived from households, regardless of the geographic areas served by the landfill.

threatens the national marketplace in solid waste management by endorsing in-state balkanizations that cannot be squared with the goals of a national economic unit, and with the particular need for the efficient, environmentally protective disposal of solid waste. The petition provides an opportunity for this Court to declare that it meant what it said in Carbone--flow control measures violate the Commerce Clause.

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

A. The Eighth Circuit Erred in its Conclusion That the "As Enforced Bifurcated" Hennepin County Ordinance 12 Was Not Subject to the "Virtually per Se Rule of Invalidity".

The Eighth Circuit's opinion instructed the district court to apply the "Pike" balancing test (Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)) rather than the "per se" test employed in Carbone. Yet this Court has made clear that import/export restrictions imposed by political subdivisions within a state that restrict the movement of waste to and from other areas within the same state are just as violative of the Commerce Clause as are "state border" restrictions. In Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 361 (1992), this Court noted that "a State (*or one of its political subdivisions*) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through subdivisions of the State*, rather than through the State itself." (Emphasis added.) Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951), stands for the same proposition.

The U.S. generates a minimum of 180 million tons of solid waste each year. See, e.g., *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) (statement of Don R. Clay, then Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency). Indeed, current estimates are closer to 200 million tons. While a significant amount--at least 15 million tons, or 8 percent--moves in commerce between states in a well-established national marketplace, substantially larger volumes are shipped between political subdivisions of the same state. Regional wastesheds exist, both within and outside of states. Moreover, it has become increasingly difficult to site and permit new disposal facilities. Accordingly, it is of considerable importance to the national economy that states and localities not seek to isolate themselves from the national and intrastate/regional markets in solid waste transportation and disposal.

Flow control and export restriction requirements disrupt those markets by "hoarding" wastes, making it difficult for operators to justify the continuation of disposal activities at costly state-of-the-art landfills. This Court has specifically rejected "any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981), reh'g denied, 453 U.S. 927 (1981).

Likewise, in several recent decisions, courts have enjoined, invalidated, or subjected to the "per se" invalidity test flow control or related measures that affected landfills or waste haulers who

handled purely intrastate, as opposed to interstate, waste shipments.[7]

Although the courts, including the district court in this case, that have invalidated seemingly "intrastate" measures or restrictions on intrastate movement have not utilized a uniform approach, there appear to be three major justifications for their position:

(1) The collection, processing, and disposal of waste is inherently a matter of interstate commerce--a proposition clearly set forth in Philadelphia v. New Jersey, 437 U.S. 617 (1978), Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992), Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994), and Carbone. See also Wickard v. Filburn, 317 U.S. 111 (1942) (the act of growing of wheat "affected" interstate commerce); Quincy College & Seminary Corp. v. Burlington N., Inc., 328 F. Supp. 808, 810 (N.D. Ill. 1971), aff'd, 405 U.S. 906 (1972). In addition, the act of the transportation of waste to a final disposal or processing facility is but one of a number of commercial transactions that have been seamlessly linked in commerce. The original raw materials that end up as "waste" were collected or mined and manufactured into goods that were transported in commerce into Hennepin County and purchased or otherwise utilized there. Moreover, collectors and transporters of waste, as well as operators of disposal and recycling facilities, not only

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[7]E.g., Mid-American Waste Sys., Inc. v. Fisher, No. C-2-94-493 (S.D. Ohio May 13, 1994); Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994); Environmental Waste Reductions, Inc. v. Georgia Dep't of Natural Resources, C.A. No. 1:94-CV-1498-FMH (Nov. 30, 1994), Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Sys., Inc., 632 A.2d 134 (Me. 1993).

participate in these acts of commerce but also routinely purchase supplies and equipment, sell collection and disposal/processing services, and finance new and expanded activities, all in interstate commerce. Accordingly, both solid waste and the parties that engage in its management for commercial reasons are inherently "in" as well as "affect" commerce.

(2) The proliferation of seemingly "local" regulations or taxes could balkanize commerce between states. See H.P. Hood & Sons v. DuMond, 336 U.S. 525, 538-39 (1949); Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

(3) The scope of the "dormant" Commerce Clause has consistently been viewed as broadly as the "proactive" Clause, and courts have virtually without exception found many seemingly local activities to be "protected" commerce--i.e., "interstate" commerce. This Court has made clear on several occasions--most recently in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S.Ct. 1590 (1997), that the scope of commerce protected by the "dormant" Commerce Clause is as broad as the "congressional" aspect of the Clause.[8] A local requirement that commodities not be exported (or imported) to or from other political subdivisions of the same state is incompatible with the scope of Federal regulation of numerous seemingly "in-state" parties and activities.

This Court's opinion in United States v. Lopez, 514 U.S. 549 (1995), has not altered the time-honored principle that even a

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[8]See also Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979) ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation"); Philadelphia v. New Jersey, 437 U.S. at 622 (declaring the absence of a "two-tiered" approach to the definition of "commerce").

purportedly "local" restriction that is expressly directed only at other activity within a state may "affect" interstate commerce and therefore be subject to Commerce Clause scrutiny. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).[9]

Moreover, the district court's opinion, and this Court's decision in Carbone, provide a fourth justification for a finding that the "as enforced" Ordinance 12 violates the Commerce Clause: the County operates to exclude all but the favored operator from the business of conducting a waste management disposal or incineration service

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[9]Numerous courts have, subsequent to this Court's opinion in United States v. Lopez, affirmed the breadth of the commerce power. Examples include United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996), aff'g 892 F. Supp. 1327 (D. Kan. 1995) (constitutionality of the Child Support Recovery Act); United States v. Lerebours, 87 F.3d 582 (1st Cir. 1996) (prohibitions on drug trafficking); United States v. Tisor, 96 F.3d 370 (9th Cir. 1996) (distribution of controlled substances); United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) (carjacking).

Indeed, the Eight Circuit has issued several opinions that conflict with its reasoning in this case. In United States v. Jensen, 69 F.3d 906 (8th Cir. 1995), the court held that 18 U.S.C. Section 1956(a), which addresses money laundering, was within Commerce Clause authority despite the fact that the activity did not involve a transaction across state lines, because the seemingly localized activities influenced or affected interstate commerce. Likewise, in United States v. Bell, 90 F.3d 318 (8th Cir. 1996), the court sustained 21 U.S.C. Section 841(a)(1), which imposes a nationwide prohibition on drug trafficking, although the defendant did not traverse a state line. In United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996), a statute that prohibits the distribution of firearms to convicted felons was upheld. Indeed, in United States v. McMasters, 90 F.3d 1394 (8th Cir. 1996), the court, in sustaining a Federal law regarding arson, reasoned that Lopez imposes no more than a requirement that the local activity have a "de minimis" effect on interstate commerce. These rulings strongly suggest that the Eighth Circuit ignored this Court's holding in Camps Newfound/Owatonna.

within the County for the receipt of locally generated waste, thus depriving other in-state and out-of-state businesses from access to the marketplace. Carbone, supra, at 389. The Eighth Circuit incorrectly contended that Ordinance 12, as enforced, tolerates the participation of out-of-state processors, who may receive wastes delivered to their distant facilities. Yet no other provider of waste management services may, after constructing a facility within Hennepin County, hope to receive any County-generated waste. Such restrictions on direct access to markets contravene the Commerce Clause. See SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995); Heier's Trucking, Inc. v. Waupaca County, ____ N.W.2d ____, 1997 WL 429011 (Wis. Ct. App. 1997).

Hennepin County, and jurisdictions like it, would ostensibly not attempt to argue that EPA national regulations governing solid waste landfills do not apply to facilities that, due to flow control requirements or otherwise, accept only in-county or in-state generated wastes. Yet the ruling below threatens to create a standard under the "dormant" Commerce Clause that simply would not be tolerated in the case of opposition to a Federally-imposed program.

A Commerce Clause philosophy that recognizes, exclusively for purposes of the "dormant" aspect of the Clause, that flow control requirements imposed by political subdivisions of a state which are not "border" counties are permissible, while those imposed by jurisdictions that are "close" to a state line are not, makes little practical or legal sense. It would mean that the citizens of, for example, Duluth, Minnesota (a border city) could benefit from the Commerce Clause, while inhabitants of St. Cloud, Minnesota (a central Minnesota city) may not. It would foster the establishment or retention of a balkanized solid waste system--one that reluctantly acknowledges the inability to restrict the export of

waste to other states, but that emphatically controls and restrains the movement of wastes between political subdivisions of the state. The aggregate effect of such measures would substantially affect interstate commerce. Like the flow control measures invalidated because they restricted the export of wastes from counties, rather than states, such "bifurcated" ordinances isolate counties from the statewide, regional (intrastate) and national marketplaces in waste disposal. Obviously, if every county or municipality adopted a similar requirement, waste disposal would without question be balkanized. Only a small percentage of generated waste would be managed in a truly national marketplace.

Likewise, the harmful effects upon the national economy that would result from judicially-sanctioned importation bans aimed at competitors within the same state justify this Court's review of the Eighth Circuit's decision. Imagine, for example, the counterproductive impacts if Houston, Texas (headquarters of Compaq), prohibited the importation of personal computers manufactured in Austin (home of Dell and other Computer manufacturers). The city of Austin would undoubtedly institute a similar ban of its own, to protect its local manufacturers. Companies deprived of market access would be harmed economically, as would purchasers of computers. These concerns are what prompted the development of the Commerce Clause, and have led the courts to invalidate a number of state and local measures that threaten to interfere with the national economy.

B. The Court below Erred in its Precipitous Finding That the Pike Balancing Test Was Applicable Despite Record Evidence of Protectionist Intent or Motivation in the Creation and Implementation of the "As Enforced Bifurcated" Ordinance.

A state or local measure that discriminates against protected commerce "either on its face *or in practical effect*" is subject to a strict standard--the discriminatory measure can survive only if it serves a legitimate local purpose and is the least discriminatory alternative to achieve local goals. Hughes v. Oklahoma, 441 U.S. 322 (1979); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). Moreover, this Court has also determined that a state or local measure that demonstrates "simple economic *protectionism*" (i.e., protectionist intent) is also subject to a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. at 623-24. If discriminatory intent is shown, a litigant may argue that per se scrutiny, and not Pike balancing, is applicable--even if the measure is worded in an "even-handed" fashion. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). The court below ignored record evidence of protectionist intent and the district court's express holding that the "as enforced bifurcated" ordinance was infected with impermissible motivation by holding that the Pike test should govern.[10]

Hennepin County has, in essence, deliberately created a scheme that tolerates the formal existence of waste exportation to other states but seeks to ensure that waste haulers not, as a

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[10]The Eighth Circuit paid particular attention to the doctrine in Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993), and SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995).

practical matter, deliver wastes to any facility other than its own. In engaging in a "temporary" act of enforcement discretion, the County undoubtedly anticipated that the substantial majority of collected waste volumes would remain subject to the flow control system. Moreover, the very nature of the "temporary" suspension, and the County's warning that long-term disposal contracts would not be advisable, clearly evidenced the desire to restrain the interstate movement of waste. The district court ascertained that, going beyond the literal wording of the "bifurcated" ordinance, there was evidence of protectionist intent or sentiment so as to justify invalidation of the measure. By ignoring that evidence, the Eighth Circuit also ignored this Court's precedents.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one which impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in Carbone, local governments have continued their efforts to create protectionist schemes that thwart the free flow of commerce. The extent of those ongoing disputes, the significance of the environmental and economic interests implicated and the need for clear and unequivocal guidance on these issues from this Court all support the grant of certiorari.

Respectfully submitted,

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November 4, 1997

MOTION FILED
NOV - 6 1997

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No. 97-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*
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HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF AMERICANS FOR TAX REFORM FOUNDATION, SMALL BUSINESS SURVIVAL COMMITTEE AND CITIZENS FOR A SOUND ECONOMY FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20pp

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Americans for Tax Reform Foundation, the Small Business Survival Committee, and Citizens for a Sound Economy Foundation move for leave to file the attached brief *amici curiae* in support of the petition in this case. Petitioners consented to the filing of this brief. Respondent has refused to give similar consent.

Each of the *amici* is a nonprofit organization engaged in research, citizen education, legislative advocacy, and regulatory monitoring in order to advance shared ideals of entrepreneurial incentive and economic freedom. Americans for Tax Reform Foundation is a nonprofit citizen advocacy group dedicated to reducing the size and

cost of government, protecting taxpayers and consumers from excessive regulation, and promoting economic freedom. The Small Business Survival Committee is a nonprofit organization representing the concerns of entrepreneurs with regard to the regulatory burdens and adverse effects imposed on small businesses by excessive governmental action. Citizens for a Sound Economy Foundation is a 250,000-member, nonpartisan, nonprofit consumer research and education group that promotes market-based solutions to public policy problems and opportunity for all people. None of the *amici* is affiliated with the waste industry, nor have any of the parties participated in the writing of this brief.

Amici, in filing this brief, wish to emphasize that the issue in this case is not limited to the problem of waste flow control, but also encompasses the ability of citizens to rely upon the unimpeded flow of all goods and services that is fundamental to our economic system. We believe that a fundamental safeguard of that system, the right of affected consumers to seek removal of state and local barriers to the free flow of commerce, is at stake. Further at issue is the principle that those harmed by unconstitutional state action should not be denied standing on "prudential grounds" because of the financial impact their recovery might have upon the government which enacted the unconstitutional provision.

Amici wish to bring this more expansive review to the attention of this Court in its consideration of the case. Accordingly, we respectfully move for leave to file the attached brief *amici curiae* in support of the petition.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether consumers of goods and services in interstate commerce fall within the "zone of interests" protected by the Commerce Clause, and if so, whether they have Article III standing to assert claims under the Commerce Clause when harmed by local discrimination.

2. Whether persons found by a court to have Article III standing and to have suffered a constitutional violation by a local government may nonetheless be denied standing and recovery based on the court's "prudential" desire to insulate the local government from the financial repercussions of its constitutional violation.

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INTERESTS OF *AMICI CURIAE*

The interests of the *amici* are set forth in the motion for leave to file a brief *amici curiae*.*

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* Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

This case arises out of an attempt by Hennepin County, Minnesota ("the county" or "Respondent") to regulate the generation, transport, and disposal of waste with a so-called "flow control" measure passed in 1989 and designated Hennepin County Ordinance No. 12 (hereinafter "Ordinance No. 12" or "the ordinance"). *See,* Petitioners' Brief at App. 78a. Ordinance No. 12 governed "the transportation and disposal of all Designated Waste generated or disposed of within the county." *Id.* at App. 90a. When implemented, the ordinance required that licensed waste haulers dispose of waste generated within Hennepin County exclusively at a designated facility in which the county had a significant financial interest. This requirement prohibited waste generators and waste haulers from participating in the interstate market for waste processing. It also imposed significantly higher disposal costs on the generators.

Hennepin County was fully aware that its actions would directly impact generators by restricting their access to out-of-state markets. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* 115 F.2d 1372, 1381 n.7 (8th Cir. 1997). It used its law-making and regulatory powers to eliminate its interstate competition in the waste disposal market. Since the county's actions left waste generators without a competitive market for disposal services, the respondent was able to generate higher disposal fees for its own disposal sites.

In 1993, the United States Court of Appeals for the Eighth Circuit invalidated a flow control program very similar to Ordinance No. 12 in *Waste Systems Corp. v. County of Martin,* 985 F.2d 1381 (8th Cir. 1993). A number of other cases were decided in the years immediately following the passage of Ordinance No. 12 that pointed directly to its unconstitutionality, including a decision by this Court. *See, C & A Carbone, Inc. v. Town*

of Clarkstown, 511 U.S. 383 (1994). Despite these decisions, Hennepin County took no immediate action to remedy an increasingly obvious Commerce Clause violation. The county continued to maintain that Ordinance No. 12 was constitutional. Respondent ultimately took the unusual step of announcing that enforcement of the flow control ordinance would be "suspended until further notice" with respect to interstate transportation of Minnesota waste because it could no longer enforce Ordinance No. 12 in good faith. However, the ordinance itself remains in place. The county has failed to make any changes to Ordinance No. 12 that would bring it into constitutional compliance and has never admitted to the ordinance's unconstitutionality.

The district court found that the county's move to suspend rather than repeal or modify Ordinance No. 12 was calculated to cause uncertainty in the waste disposal market. Furthermore, the trial court found that the uncertainty caused by the suspension of Ordinance No. 12 was designed with a discriminatory purpose. It was intended to preserve the unconstitutional barrier to interstate commerce established by Ordinance No. 12.

The plaintiffs in *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, consisting of several in-state waste haulers, and one in-state and one out-of-state landfill, filed suit in 1994 in the federal district court for the District of Minnesota. The plaintiffs in *Robinson Rubber Products Company, Inc. v. Hennepin County*, composed of a certified class of Hennepin County residential and commercial waste generators, filed suit in 1995. The *Oehrleins* plaintiffs and the *Robinson Rubber* plaintiffs maintained that Ordinance No. 12 was an unconstitutional violation of the Commerce Clause, and sought both injunctive relief against enforcement of the ordinance and damages.

At trial, the county offered little to dispute the unconstitutionality of Ordiance No. 12 itself, but argued that

the plaintiffs had no standing to challenge it. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County,* No. 4-94-63 (D.C. Minn. *filed* March 28, 1996). The district court disagreed and held that the plaintiffs in both *Oehrleins* and *Robinson Rubber* had standing having met the tripartitie requirements of particularity, traceability, and redressability set forth by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). *See, Ben Oehrleins and Sons and Daughter, Inc.,* No. 4-94-63 at 7 (Pet. Brief at App. 34a-35a); *Robinson Rubber Products,* No. 4-95-220 at 5 (Pet. Brief at App. 49a-50a). The district court also determined that the waste generator plaintiffs in *Robinson Rubber* were within the zone of interests protected by the Commerce Clause. *Rubber Products,* No. 4-95-220 at 8 (Pet. App. at 52a-56a).

With respect to substantive questions pertaining to the constitutionality of Ordinance No. 12, the district court found that the measure discriminated against interstate commerce both as enacted and as enforced, even after the Respondent "suspended" its application. Based on this determination of unconstitutionality, the district court issued a partial summary judgment and permanently enjoined Hennepin County from enforcing the ordinance.

The holding of the district court that the *Oehrleins* plaintiffs had standing was affirmed by the United States Court of Appeals for the Eighth Circuit in a consolidated appeal. The holding that Ordinance No. 12, as written and enforced prior to the county's suspension, facially discriminated against interstate commerce was also upheld. The Court of Appeals, however, reversed the district court in holding that although the *Robinson Rubber* plaintiffs met Article III standing requirements, they were not within the zone of interests protected by the Commerce Clause. As such, the Eighth Circuit held that the *Robinson Rubber* plaintiffs lacked standing to collect damages. The Court of Appeals also reversed the district

court in holding that once the county suspended enforcement, the ordinance as enforced ceased to be discriminatory to out-of-state interests. The appellate court then remanded that part of the *Oehrleins* case necessary for determination.

ARGUMENTS

This case raises important constitutional questions about the standing of individuals under the dormant Commerce Clause and the extent to which a court may deny them standing to seek relief based on prudential concerns. With specific regard to the issue of standing, the opinion of the Court of Appeals undermines the precedent set forth by this Court in a line of cases dating from 1949. This Court has made clear that the Commerce Clause of the United States Constitution, and restrictions imposed on the States by the dormant Commerce Clause, are intended to shield consumers from the parochial interests of local and state governments when they intervene in interstate commerce. In essence, consumer protection from local discrimination is an inherent and fundamental purpose of the Commerce Clause.

Mere acknowledgment of such a purpose is scant protection for aggrieved consumers unless their rights to engage in interstate commerce can be safeguarded and vindicated. Allowing standing for harmed individuals to seek relief is necessary to ensure that the protections afforded by the Commerce Clause are not eviscerated. If those directly harmed by local protectionism must rely on third parties to assert their rights, or are deemed incapable of asserting them at all, then the protection of the Commerce Clause is substantially diminished. The decision of the Court of Appeals represents such an erosion and is in direct conflict with this Court's holdings. As such, it merits careful scrutiny.

I. STANDING FOR INDIVIDUALS TO SEEK RELIEF FROM DISCRIMINATORY LOCAL LAWS IS A NECESSARY COMPONENT OF AN EFFECTIVE DORMANT COMMERCE CLAUSE

The United States Constitution, Article I, Section 8, Clause 3, provides: "The Congress shall have Power . . . To regulate Commerce with Foreign Nations and among the several States, and with the Indian Tribes." This Court has found from its earliest cases, that this grant of power contains an inherent "dormant" element which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dept. of Environ. Quality*, 511 U.S. 93 (1994). Indeed, the primary protection against discriminatory local barriers to commerce has been the dormant Commerce Clause jurisprudence first enunciated by this Court in *Gibbons v. Ogden*, 22 U.S. 1 (1824). This jurisprudence has developed mainly as a result of actions brought by those individuals harmed by the application of state and local laws that favor in-state transactions or discriminate against interstate commerce.

A. The Individual Right To Engage In Interstate Commerce Is Strongly Rooted In Precedent And Attaches To All Stages Of The Stream Of Commerce.

The Commerce Clause was intended to fulfill two of the Constitution's primary purposes: the creation of a national marketplace and prevention of economic balkanization. It is designed to prevent States from engaging in harmful and retaliatory trade wars with one another. Although local governments have indeed been vigorous in their attempts to impose barriers upon interstate commerce, they have not been as zealous in seeking removal of such barriers imposed upon their own citizens by other states or localities. Traditionally, it has been those individuals affected by the discriminatory practice of a state or local government who have been most active and effective in seeking removal of such impediments.

The most efficient manner of deterring the enactment of policies which discriminate against interstate commerce is to grant individuals the right to challenge such policies directly. A system in which citizens harmed by a discriminatory barrier are dependent upon their own local government or another third party to assert their rights under the Commerce Clause would not provide for consistent, efficient, or equitable application of Commerce Clause jurisprudence. For instance, it might be more expedient for a State to retaliate using its own laws than to seek to invalidate protectionist efforts of other jurisdictions. Other States might choose not to act at all to protect their citizens from discriminatory barriers erected in other jurisdictions. Because of such concerns, this Court has held that the right to engage in interstate commerce is an individual right guaranteed by the United States Constitution and actionable under 42 U.S.C. § 1983. *Dennis v. Higgins*, 498 U.S. 439 (1991).

Defining the right to engage in interstate commerce *as an individual right* is critical in order to realize the system which the Framers of the Constitution envisioned, one where: "[e]very farmer and every craftsman be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

The Commerce Clause protects the rights of individuals all along the stream of interstate commerce by allowing them to seek removal of discriminatory barriers. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202-203 (1994) ("[F]or over one-hundred and fifty years, our cases have rightly concluded that the imposition of a differential burden *on any part of the stream of commerce*—from wholesaler to retailer to consumer—is invalid." (emphasis added.)) This Court has readily found

standing under the Commerce Clause in a myriad of cases where an out-of-state seller seeks removal of some locally erected, tariff-like barrier that discriminates in favor of in-state interests. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Healy v. The Beer Institute*, 491 U.S. 324 (1989). But this Court has recognized that plaintiffs need not always fit into the category of "out-of-state seller" in order to have standing under the Commerce Clause to seek a constitutional remedy. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S.Ct. 1590 (1997). Granting standing to such plaintiffs greatly facilitates the removal of unconstitutional barriers and has an equally important deterrent effect upon localities and state governments.

It ordinarily requires a tremendous twisting of both logic and the purpose of the Commerce Clause to conclude that one participant in an interstate transaction is entitled to standing while the other party to the same transaction lies outside the scope of constitutional protection. However, the Eighth Circuit Court of Appeals came to precisely this conclusion in denying standing for the *Robinson Rubber* plaintiffs while allowing standing for the *Oehrleins* plaintiffs. In holding thus, the Eighth Circuit has created uncertainty about this Court's established standing jurisprudence. The Court of Appeals' decision, if allowed to stand, could encourage further intrusion into the marketplace by those intent on discriminating against interstate commerce, as the deterrent effect upon localities becomes considerably weakened and the purpose of the Commerce Clause is seriously undermined.

B. The Court of Appeals Erred In Concluding That The Generators Suffered No Violation Of Their Rights And Are Outside The Zone Of Interests Protected By The Commerce Clause.

The Court of Appeals misapplied the zone of interests test that this Court has set forth in reasoning that the

Robinson Rubber plaintiffs must be directly subject to the discrimination in order to have standing. *Ben Oehrleins and Sons and Daughter, Inc.*, 115 F.3d at 1385. The Court has squarely rejected this "directly regulated" requirement on several occasions, recognizing that onerous barriers to interstate commerce may do serious harm to individuals either directly or indirectly. Just last term in *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* a municipality sought to deny standing to an in-state plaintiff based on the indirect nature of a discriminatory assesment it had imposed on summer camps. The Court dismissed directness as a reason to deny standing in that case in finding that: "The discriminatory burden is imposed on the out-of-state customer *indirectly* by means of a tax imposed *on the entity transacting business* with the non-Maine cutomer." 117 S.Ct. at 1600 (emphasis added).

In several other cases, most notably *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) and *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), this Court has founded that neither the indirect nature of a barrier, nor the in-state character of those bringing a challenge, excluded plaintiffs from the zone of interests protected by the Commerce Clause. In *General Motors Corp. v. Tracy,* 117 S. Ct. 811 (1997), this Court explained that: "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates. . . . Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III." *General Motors Corp.*, 117 S. Ct. at 818.

Besides addressing the concept of directness, the above cases provide even more confirmation that the individually actionable right to engage in interstate commerce articulated in *Dennis* extends to those at all stages of the stream of commerce, including in-state consumers. To

hold otherwise, as the Court of Appeals did, creates an enormous loophole for localities whose actions impede the free flow of interstate commerce. More importantly, it would render the individual right guaranteed by *Dennis* inaccessible to some of the most severely harmed parties. The direct/indirect test envisioned by the Court of Appeals when applied in this case creates an unnecessary distinction between those generators who haul their own waste and those who contract with third parties to do so, even though they suffer similar harm. There is nothing in the precedent of this Court to justify a return to an Articles of Confederation era definition of interstate commerce as including only those who physically cross state lines.

In addition to erroneously narrowing the zone of interests that this Court has held to be protected by the Commerce Clause, the Court of Appeals in the same stroke narrowed the definition of constitutional injury. Following the logic of the Court of Appeals, merely paying increased costs directly traceable to a discriminatory barrier is insufficient to invoke standing under the Commerce Clause, even when the cost of the harm equals tens of millions of dollars. Such a holding here is even more surprising considering that the potential for a significant financial impact on the Respondent contributed to the Eighth Circuit's denial of standing for the *Robinson Rubber* plaintiffs on prudential grounds. *See, Ben Oehrleins and Sons and Daughter, Inc.*, 115 F.3d at 1387 n.9.

II. DENIAL OF STANDING ON PRUDENTIAL GROUNDS BECAUSE OF THE FINANCIAL CONSEQUENCES FOR THE UNCONSTITUTIONAL GOVERNMENT ACTOR SETS A DANGEROUS PRECEDENT

In addition to Article III standing grounds and prudential considerations about the zone of interests test, the Court of Appeals based its denial of standing in part on

alternative prudential considerations. The lower court alluded to its concerns about the costs associated with a finding adverse to Hennepin County as one justification for denying standing to the in-state waste generator plaintiffs.

> We are mindful that granting standing to consumers bearing passed-on costs in Commerce Clause cases could have serious repercussions on state and local governments' ability to enact economic regulations. This is because they would risk enormous liability if such regulation is later invalidated. Here, for example, the waste generator plaintiffs' damage claims exceed $100 million. Especially in the current context, where limits of local authority to regulate waste streams are unclear, such risks presents (sic) a heavy burden to good faith efforts to enact valid laws intended to further important local goals.

Ben Oehrleins and Sons and Daughter, Inc., 115 F.3d at 1387 n.9.

Not only does the Court of Appeals appear to be attempting to fashion from the doctrine of prudential standing a "good faith exception" to unconstitutional activities on the part of State and local governments, it does so in direct conflict with this Court's precedent.

As discussed in Section I, *supra*, the ability of individuals to seek vindication under the Commerce Clause is a fundamental component of the framework developed by the Founding Fathers to ensure that the States, while preserving their sovereignty, do not do so at the expense of other States, American consumers, or national unity.

Given the importance that the Founders placed on the free flow of commerce, and the natural inclination of many States to protect domestic industries at the expense of other States, the Court of Appeals' attempt to create a "good faith" justification for invoking the prudential standing doctrine is wholly inappropriate. The grounds cited by the lower court for invoking such an exception—

the potential cost of remedying unconstitutional state action—set a dangerous precedent. If the cost of remedying unconstitutional activity is a factor in determining whether a plaintiff has standing, there is the potential for a perverse outcome: unconstitutional state action that has a *de minimus* economic effect may be remedied, but similar action that requires substantial resources to compensate those who have suffered more serious injuries may not.

Lower courts should not be permitted to invoke the prudential standing doctrine to determine when justice is affordable for the public and when it is not. To do so would inject a measure of capriciousness in our judicial system much like the now discredited concept of "substantive due process." *See, e.g., Lochmar v. New York,* 198 U.S. 45 (1905), *overruled, in part, by Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421 (1952) and *overruled, in part, by Ferguson v. Skrupa,* 372 U.S. 726 (1963).

Aside from being inappropriate, the lower court's justification for denying standing on prudential grounds ignores precedent. This Court has consistently held that the economic costs of remedying an unconstitutional act have no bearing on the ability of plaintiffs to seek relief. *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 393-94 (1994) (The generation of revenues is not a local interest that may justify the erection of barriers to the free flow of interstate commerce.); *Maryland v. Craig,* 497 U.S. 836, 870 (1990) (Scalia, J., dissenting) ("We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings."); *McKesson v. Division of Alcoholic Beverages and Tobacco,* 486 U.S. 18, 51 (1990) (A "clear and certain remedy" is a fundamental requirement for due process.); *Bounds v. Smith,* 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial."). *See also, Atlantic Coast Demolition and Recycling v. Board*

of Chosen Freeholders, 112 F.3d 652, 666-67, 671-72 (3d Cir. 1997), *petition for cert. filed as* Nos. 97-400 and 97-430.

The potential cost of remedying the injuries caused by the effect of Hennepin County's flow control ordinance on interstate commerce, or any other constitutional injury, should have no bearing on whether a court invokes the doctrine of prudential standing. Any other outcome would endanger the judicial system by undermining the public's confidence in our courts and judges and would erode political accountability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FILED
NOV - 6 1997

(5)

No. 97-605

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BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE MAYORS' TASK FORCE AGAINST WASTE FLOW IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus*, The Mayors' Task Force against Waste Flow, respectfully moves for leave to file the attached brief

amicus curiae in support of petitioner. Petitioner has consented to the filing of the brief and a copy of petitioner's written consent has been filed with the Clerk of this Court. This motion is necessary because the respondent Hennepin County has withheld consent.

Amicus, an association of 240 mayors from New Jersey has a strong interest in legal matters that affect the standing of solid waste generators. The constituents of the Mayors' Task Force against Waste Flow represent a significant portion of the generators of solid waste.

Because the question presented by the petition is of great importance to *amicus, amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE MAYORS' TASK FORCE AGAINST WASTE FLOW IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus is an association of Mayors from the State of New Jersey.* In 1994, the Mayors' Task Force was formed by a small group of Mayors to petition and advise the United States Congress (particularly the New Jersey delegation) of local communities' view of waste flow control regulations. The Mayors' Task Force quickly grew to 240 mayors from all across the state, including from 7 of the 10 largest cities.

* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

The Mayors have continued to highlight the concerns of local municipalities that waste flow control contributes to New Jersey's dubious position as having the highest disposal fees in the nation. The monopolies or "favored" facilities are free to charge tipping fees substantially higher than otherwise available in the open market.

The purpose of this *amicus curiae* brief is to provide the Court with a local public sector perspective. Waste flow control has been described ostensibly as providing safe and efficient disposal of garbage. While the Mayors' Task Force recognizes, appreciates and vigorously supports such goals, waste flow control supports neither of these goals. Our municipalities are generators of sold waste and forced customers of the so-called favored facilities.

SUMMARY OF ARGUMENT

The intent, purpose and effect of local flow control is to generate revenue for favored facilities. The ultimate cost of which is borne by the generators of the garbage. The generators are thus directly harmed by the flow control. The generators should have the right to seek relief in Federal Court.

If haulers pass the cost of flow control to the generators, it is the generators who are best suited to challenge the discriminatory law. A policy of preventing the consumer from having his day in court is a dangerous precedent for the day that a right is not asserted.

ARGUMENT

A GENERATOR OF SOLID WASTE MUST HAVE STANDING TO ASSERT A CLAIM FOR A VIOLATION OF THE COMMERCE CLAUSE.

Local governments are generators of solid waste like any other entity. The purpose of flow control is to enhance the "favored facilities" financial status. In many

cases, the facility is a county operated utility authority. These utility authorities are distinct creatures from municipalities. Often, they have little accountability to municipalities. With flow control, they have found financial bonanzas—at the expense of municipalities.

In New Jersey, the effect of waste flow has led to the highest disposal rates in the nation, which in turn contributes to the highest property taxes. The issue of higher taxes is one faced squarely and solely by local governments. It is only since this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994) that our communities have seen a hint of relief. In our case, New Jersey resisted the holding of *Carbone* until forced to do so by the Court of Appeals in *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders,* 112 F.3d 652 (3rd Cir. 1997).

The flow control laws most directly impact generators, or consumers, of solid waste disposal. They must have a say in the issues that arise from flow control. They must have recourse. If haulers are allowed to pursue claims, there will be no saving of judicial resources by allowing the generators their day in Court. County or State entities will not avoid the challenge to their system just because generators are refused the opportunity to present their claims. The generators are natural parties to litigation involving the regulator and regulated for they are served by the regulated entity and the regulator is theoretically looking out for their interests. However, when the consumer feels that the regulator is not serving his or her interest, the court opinion below states that the consumer is protected by the regulated entity. This turns on its head any notion of traditional utility workings.

Generators, including municipalities, are directly injured by the actions of the governmental entity enforcing flow control. They fall with the "zone of protection" provided by the Commerce Clause, as purchasers of interstate waste services.

The refusal to allow the consumers of solid waste disposal services to assert their claims risks insulating the county authorities from responsibility. If the party that is ultimately harmed as a result of the utility authorities unconstitutional actions is prevented from recourse, the authorities will have less incentive to act prudently. They will have little to no incentive to assure that their actions are commensurate with the law. Rather than err on the side of prudence, the utility authorities will act on the side of their own financial gain. Without the prospect of having to return excess tipping fees illegally collected, some officials may be inclined to press their unconstitutional system for extended periods of time to allow it to continue receiving this largess.

The Court needs look no further than New Jersey to see the results of this scenario. This Court decided *Carbone* on May 16, 1994. Despite the holding of *Carbone*, New Jersey continued to vigorously defend its system and the counties continued to collect exorbitant tipping fees. As of the writing of this brief, New Jersey continues to defend its system to the financial detriment of the generators.

After this Court's decision in *Carbone*, the Third Circuit Court of Appeals applying *Carbone* to New Jersey, held that New Jersey's regulations "discriminate against interstate commerce by restricting the access to out-of-state facilities to waste processing and disposal service markets," and could be sustained only if they fell within " 'a narrow class of cases in which the [government] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.' " *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3rd Cir. 1995). After this decision, New Jersey continued to defend its system. The counties continued to collect the tipping fees.

As both the Court of Appeals and the District Court recognized, New Jersey "vowed not to abandon its present

system until compelled to do so." *Atlantic Coast*, 48 F.3d at 718; *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 931 F. Supp. 341, 351 n.5 (D.N.J. 1996). New Jersey perpetuated its system to the detriment of the generator. If the generator lacks the ability to seek recourse in the Court, the government will only be emboldened to preserve its concededly unconstitutional system. Several of the mayors from the Mayors' Task Force were denied standing by the District Court in *Atlantic Coast* in an unpublished decision. Thus, the Mayors' Task Force has felt the sting of being silenced in the courtroom.

The issue here is whether the damaged party has a right to be heard. As large generators of solid waste and acutely sympathetic to the plight of *public* officials, the Mayors' Task Force supports the right of the generator to be heard.

CONCLUSION

For the reasons stated above, *amicus* urges this Court to grant a Writ of Certiorari.

Respectfully submitted,

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MOTION FILED
NOV - 6 1997

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONERS

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16 pp

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Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus*, National Restaurant Association, respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of the brief. However, this motion is made necessary because the respondent Hennepin County, Minnesota has not responded to our consent request.

Amicus, the leading trade association for the food service industry representing over 32,000 food service providers, has a substantial interest in the legal matters that

affect the costs of solid waste disposal. This case, which involves an ordinance that restricts the markets where restaurants and other waste generators can go for competitive waste disposal prices, presents the question of whether waste generators, as consumers of waste disposal services, have standing to challenge the constitutionality of flow control ordinances such as the one involved in the instant matter.

Since the question presented by the petition is of substantial importance to *amicus'* members, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Do waste generators, as consumers of waste disposal services, have standing to challenge the constitutionality of a "flow control" ordinance that designates where waste may be disposed of?

2. May consumers that meet Article III standing requirements and have interests that fall within the "zone of interests" to be protected by the Commerce Clause nevertheless be denied constitutional standing on "prudential" grounds?

3. Does a "flow control" ordinance that favors in-state facilities over out-of-state facilities by hoarding the waste disposal market and preventing out-of-state competition discriminate against interstate commerce?

LIST OF PARTIES

The *Oehrleins* matter, No. 96-2120 in the court below, and the *Robinson Rubber* matter, No. 96-2710 in the court below, were considered on consolidated appeal in the court of appeals and judgment was rendered in a single opinion. Consequently, both matters are consolidated in this petition.

Ben Oehrleins and Sons and Daughter, Inc.; Elk River Landfill, Inc.; Gallagher's Service, Inc.; Knutson Services, Inc.; Randy's Sanitation, Inc.; Poor Richard's, Inc.; Vasko Rubbish Removal, Inc.; Wasteco, Inc.; Waste Systems Corp.; and Walter's Recycling & Refuse Service were appellees in the *Oehrleins* matter and are petitioners here.

Robinson Rubber Products Co., Inc.; Dean M. Akins; Patrick Schoenecker; and Brad Robinson, individually and on behalf of all other persons similarly situated, were appellees in the *Robinson Rubber* matter and are petitioners here.

Hennepin County, Minnesota was appellant in both matters below and is respondent here.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-605

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICUS CURIAE* OF THE NATIONAL RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Restaurant Association ("Association") is the leading trade association representing over 32,000 restaurants, fast food chains and other food service providers nationwide in every state, including Minnesota.* Restaurants, similarly situated as the Robinson Rubber petitioners (hereinafter "Robinson Rubber") here, generate solid waste.

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

The Eighth Circuit's ruling in this case is of serious concern to the Association and its members for a number of reasons: it upholds an ordinance that creates an intrastate monopoly in the waste disposal industry, which forces restaurants and other designated waste generators to pay more for services previously provided by the free market; it takes away waste generators' right to challenge a monopolistic ordinance by denying them standing, even though the court admits they meet Article III standing requirements; and finally, the decision has wide-spread application because the facts leading to the enactment of the flow control ordinance in this case are not unique. As landfill capacity becomes more costly and scarce, an increasing number of state and local governments may seek to develop new trash control systems. Consequently, other jurisdictions may look to the Eighth Circuit's precedent for guidance in instituting their own flow control programs.

SUMMARY OF ARGUMENT

Amicus urges this Court to grant Petition for Writ of *Certiorari* for a number of reasons. First, as a class that is directly regulated by a flow control ordinance, waste generators have a right of action to challenge the constitutionality of an ordinance that restricts them from seeking more competitive waste disposal markets. This right of action has been stripped away by the Eighth Circuit's denial of standing.

Second, waste generators, as consumers of waste disposal services, overcome "prudential" barriers to standing because they have legally recognized interests that fall within the zone of interests directly protected by the Commerce Clause. Therefore, the Eighth Circuit wrongly denied standing to waste generator appellants on "prudential" grounds.

Third, a discriminatory law, such as the one in question here, is subject to rigorous scrutiny and is unconstitutional *per se* absent a showing by the government

that it has no other means to further a legitimate local interest. The appeals court erroneously found the ordinance to be non-discriminatory, and therefore improperly directed the district court to review the law's constitutionality by using a relatively lenient balancing test.

ARGUMENT

I. PETITION FOR *CERTIORARI* SHOULD BE GRANTED TO ADDRESS THE ISSUE OF STANDING IN ORDER TO ASSURE THAT ROBINSON RUBBER (AND MANY SIMILARLY SITUATED WASTE GENERATORS, SUCH AS RESTAURANTS), WHICH SUFFERED SIGNIFICANT FINANCIAL INJURY AS A RESULT OF A "FLOW CONTROL" ORDINANCE HAS JUDICIAL REDRESS FOR ITS INJURIES.

The court of appeals ruled that Robinson Rubber and other designated waste generators, such as restaurants, that paid artificially inflated waste disposal charges due to flow control have no legal standing to pursue recovery of the overcharges, even though the court conceded that they had been damaged. The court, in effect, narrowed the protection of the Commerce Clause to waste haulers and those individuals or entities that actually paid the inflated costs in the first instance. According to the appeals court, it did not matter that the waste haulers that paid higher "tipping fees" as they dumped their waste at the County incinerator ultimately passed these costs on to their customers, and it was the customers that bore the brunt of the flow control scheme. Instead, the court denied standing to the injured waste generators by characterizing them as "mere consumers" of waste disposal services who were attempting to assert the third party rights of waste haulers. As explained immediately below, the appeals court, contrary to this Court's precedent, erroneously held that consumers do not have standing in their own right to seek judicial relief for injuries caused by violations of the Commerce Clause.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court made clear that in order to have constitutional standing to sue, a plaintiff must demonstrate that (1) an "injury-in-fact" exists—that is, the invasion of a legally recognized interest that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is "fairly traceable" to the challenged action; and (3) it is likely that a favorable decision will redress the injury. *Id.* at 560-61. These standing requirements are designed to ensure that plaintiff has alleged sufficient stake in the outcome of the case to assure concrete adverseness as is required by the "cases and controversies" provision of Article III of the U.S. Constitution.

Here, the appeals court found that the waste generator appellants satisfied Article III's requisites for standing: they suffered injuries-in-fact by paying higher waste disposal costs; these higher costs were fairly traceable to the enactment of Ordinance 12, the challenged flow control ordinance; and it is likely that a decision in the waste generators' favor will redress their injuries by awarding them damages and enjoining enforcement of the ordinance.

Notwithstanding the court's finding that generator appellants had Article III standing, the court wrongly concluded that the generators' injuries were "indirectly," traceable to Ordinance 12's restriction on haulers. In fact, the generators' injuries are *directly* traceable to Ordinance 12 because the ordinance expressly restricts generators, as well as haulers. By characterizing the traceability as "indirect," the appeals court found tenuous grounds to conclude that as "mere consumers" of waste disposal services, generators do not have standing to challenge the constitutionality of the ordinance. The court then found that generator appellants were attempting to assert the third party rights of waste haulers and others who directly paid the increased "tipping fees" as they

dumped their waste at the County incinerator and denied them standing on "prudential" grounds.

II. PETITION FOR *CERTIORARI* SHOULD BE GRANTED SINCE THE APPEALS COURT MISAPPLIED THE "PRUDENTIAL LIMITATIONS ON STANDING" DOCTRINE IN THIS CASE.

Even though plaintiffs demonstrate Article III standing, federal courts may nevertheless deny standing on "prudential" grounds when the grant of standing would be practically unwise. *See Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 221-227 (1974) (plaintiff does not have standing to seek redress for "generalized grievances"); *Warth v. Seldin,* 422 U.S. 490, 500 (1987) (plaintiff does not have standing to assert the rights of third parties). To overcome such prudential limitation on standing, a plaintiff must show that he or she is arguably within the "zone of interests" protected by the statute or constitutional provision relied upon, here the Commerce Clause. *Bennett v. Spear,* 117 S. Ct. 1154, 1161 (1997) (quoting *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153 (1970)); *Clark v. Securities Industry Association,* 479 U.S. 388, 396 (1987).

This Court has repeatedly held, however, that consumers have interests that fall within the zone of interests to be protected by the Commerce Clause, and therefore have standing to challenge ordinances that unconstitutionally discriminate against interstate commerce. In *Dennis v. Higgins,* 498 U.S. 439 (1991), this Court explicitly stated that the Commerce Clause is for the benefit of individuals engaged in interstate commerce and emphasized:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and

> no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer* may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. (Emphasis added.)

Id. at 449 (quoting *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 539 (1949)).

Moreover, this Court recently stated in *General Motors Corp. v. Tracy,* 117 S. Ct. 811 (1997), that:

> [c]ognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a state ultimately discriminates, and customers of that class may also be injured, as in [the] case where the customer is liable for payment of the tax and as a result presumably pays more for the gas it gets from out-of-state producers and marketers. Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III.

Id. at 818.

Accordingly, the appellant generators here are not seeking to assert the rights of third parties, but their own rights protected by the Commerce Clause. Moreover, as consumers of waste disposal services, the appellant waste generators are direct participants in the waste disposal market and have interests that fall within the zone of interests to be protected by the Commerce Clause. Consequently, the improper application of the prudential standing test in this case denies standing not only to Robinson Rubber, but to similarly situated waste generators, such as restaurants, who are unconstitutionally forced to pay inflated waste disposal costs. In these circumstances, Commerce Clause jurisprudence gives injured consumers a right of action which is presently being

taken away by the Eighth Circuit. Left unchanged, the Eighth Circuit's ruling traps injured generators in an unconstitutional flow control scheme without providing a judicial forum from which to seek relief. *Certiorari* should be granted to rectify this situation.

III. PETITION FOR *CERTIORARI* SHOULD BE GRANTED BECAUSE THE APPEALS COURT ERRONEOUSLY DIRECTED THE DISTRICT COURT ON REMAND TO APPLY A RELATIVELY LENIENT BALANCING TEST, RATHER THAN "RIGOROUS SCRUTINY," IN EVALUATING THE CONSTITUTIONALITY OF ORDINANCE 12.

Though the appeals court denied standing to the waste generator appellants, it granted standing to the waste hauler appellants (represented by Ben Oehrleins and Sons and Daughters, Inc.). The court then held that Ordinance 12 as enforced on waste that stays within the state—that is, "intrastate" flow control—does not discriminate against interstate commerce, and therefore violates the Commerce Clause only if it fails the balancing test set forth in *Pike v. Bruce Church,* 397 U.S. 137 (1970). The *Pike* test applies to non-discriminatory state laws and upholds such laws "unless the burden imposed on . . . commerce is clearly excessive in relation to the putative benefits." *Id.* at 142. The court remanded the question of whether Ordinance 12 as applied to intrastate commerce unconstitutionally discriminates against interstate commerce, but erroneously directed the district court to apply the inappropriate level of scrutiny by instructing it to use the *Pike* balancing test. As proven below, Ordinance 12 is discriminatory, not non-discriminatory. Therefore, "rigorous scrutiny" is the proper test to determine its constitutionality.

In a Commerce Clause challenge, the burden is initially on the plaintiff to show that the legislation is discriminating against interstate commerce on its face or in its

purpose or effect. *Hughes v. Oklahoma,* 411 U.S. 322, 326 (1979). Flow control laws that discriminate in favor of local waste facilities trigger heightened scrutiny because they hoard a valuable economic resource such as garbage. *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677, 1682-83 (1994). A statute that discriminates in favor of a local investment is *per se* unconstitutional "save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." *Id.* at 1683 (citing *Maine v. Taylor,* 477 U.S. 131 (1986)). For purposes of the Commerce Clause, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon,* 114 S. Ct. 1345, 1350 (1994).

Ordinance 12 as written requires all "Designated Waste" generated within Hennepin County to be delivered to "Designated Facilities." One of the two designated facilities is a municipal incinerator which the County constructed by issuing approximately $150,000,000 in bonds. This designation allowed the County to charge substantially higher fees than those charged by other waste disposal facilities.

In addition, Ordinance 12, as written, prohibits the out-of-state disposal of County waste. In 1993, rather than permanently amend Ordinance 12, the County merely suspended, "until further notice," enforcement of the ordinance with respect to waste destined for out-of-state disposal. The ordinance was suspended rather than amended with the express purpose of discouraging interstate commerce by threatening of out-of-state enforcement at any time. This purpose is evidenced by a legal memorandum sent from the County's legal counsel to the County Administrator and read, in pertinent part:

> [S]uspending the enforcement of designated waste destined for disposal outside the state of Minnesota [] would put haulers on notice that it would not be prudent to enter into long-term contracts for waste disposal outside of the state at this time. . . .
>
> The risk [that the entire Ordinance may be found to be unconstitutional] is, however, probably preferable to suspending enforcement of both in-state and out-of-state disposal, resulting in the County losing the waste altogether, to long-term hauler contracts.

See Appendix 121a of Petitioners' Petition for Writ of *Certiorari.*

Plainly, Ordinance 12's differential treatment of in-state and out-of-state economic interests benefits the former by increasing County revenues by hoarding the waste disposal market and burdens the latter by dramatically restricting access to the County's waste disposal market. Moreover, the ordinance's underlying discriminatory purpose of discouraging out-of-state waste disposal is revealed by the County's internal legal memorandum. Such differential treatment is, by definition, discriminatory, and therefore unconstitutional *per se* unless the County can prove, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Certiorari* should be granted to correctly instruct the district court to use rigorous scrutiny to evaluate Ordinance 12's constitutionality, rather than the *Pike* balancing test ordered by the appeals court.

CONCLUSION

For all the foregoing reasons, The National Restaurant Association requests that this Honorable Court grant Oehrlein's and Robinson Rubber's consolidated Petition for Writ of *Certiorari*.

Respectfully submitted,

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No. 97-605

Supreme Court, U.S.
FILED
NOV 24 1997
CLERK

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent's brief in opposition highlights the significance of the court of appeals' departure from this Court's precedent. Under the view of the Commerce Clause adopted by the court of appeals and championed by Respondent, a local producer will no longer have the "certainty that . . . no home embargoes will withhold his exports." State and local governments will be allowed to apply the pinch to interstate commerce, so long as the part that feels the squeeze is only "personal consumer finances." The reach of the dormant Commerce Clause will no longer equal that of the affirmative where standing is concerned. And a class of individuals, named in an unconstitutional ordinance and intended by their local government to bear the primary burden of its regulation, will no longer have a cause of action under Section 1983 simply because they can be characterized as consumers. As the filing of several briefs by amici in support of the petition confirms, that view of the Commerce Clause is wrong in many important particulars that merit this Court's review.

I. THE DECISION BELOW RADICALLY CURTAILS THE LAW OF STANDING AND DENIES A REMEDY TO THOSE MOST AFFECTED BY THE COMMERCE CLAUSE VIOLATION

The court of appeals seized upon the fact that most of the Petitioners were "consumers" to create a new doctrine of standing that focuses on where the burden on commerce is erected, rather than on who is hurt thereby. Since the local government here interdicted the stream of commerce by restricting the movement of an intermediary, the waste haulers, the court of appeals concluded that the waste generators were not "directly" affected, and therefore they were neither in the "zone of interests" of the Commerce Clause nor did they have a viable claim under the "third party standing" doctrine.

A. Petitioners Assert Their Own Rights To Engage in Interstate Commerce, Rather Than Those of Third Parties

The court of appeals' analysis of third-party standing only becomes relevant if Petitioners have no Commerce Clause rights of their own to assert, and the court of appeals' decision that Petitioners do not is its principal and most important error. Petitioners sought relief from an ordinance primarily enacted to affect their own waste generation and disposal activity. The fact that others, in this instance waste haulers, were also affected does not relegate Petitioners to mere incidental status, as was the case in *Warth v. Seldin*, 422 U.S. 507 (1975), relied on so extensively by the court below.

In *Warth*, taxpayer residents of Rochester, New York alleged that discriminatory housing practices in neighboring Penfield forced Rochester to build more low-income housing than it otherwise would have, which allegedly caused higher taxes for Rochester residents. The Court noted that "[p]etitioners do not, even if they could, assert any personal right under the Constitution . . . to be free of action from a *neighboring municipality* that may have some *incidental adverse effect* on Rochester." 422 U.S. at 509 (emphasis supplied). They did not allege (and could not have alleged) that their own equal protection rights were harmed by neighboring Penfield. Any injury suffered by the *Warth* petitioners "result[ed] only from decisions made by the appropriate Rochester authorities, who are not parties to this case." *Id.*

Here, in sharp contrast, Petitioners allege that their own County directly, intentionally, and measurably interfered with Petitioners' own rights to participate in interstate commerce. "Third party" standing doctrine does not apply. Instead, Petitioners' standing is based on meeting the requirements of Article III (with which the court of appeals agreed) and asserting rights of their own which come within the zone of interests of the dormant Com-

merce Clause.[1] No further requirements need be met. *See Data Processing Service v. Camp*, 397 U.S. 150 (1970).

B. Respondent Cannot Square the Court of Appeals' View of the Zone of Interests of the Commerce Clause With This Court's Precedent

As Respondent correctly asserts, the court of appeals essentially holds that only those consumers who physically cross state lines or directly "purchase goods or do business across state borders" are engaged in interstate commerce; all others are conclusively presumed to be outside the zone of interests the Commerce Clause protects. App. 12a-13a. Under that view, transacting with a hauler who hauls waste out-of-state either is not part of interstate commerce at all, or is insufficiently important to create a right to relief for the demonstrably injured purchaser of waste disposal services. Opp. at 15; App. 12a.

Neither Respondent nor the opinion below, however, can explain away at least three Supreme Court cases—*Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); and *Boston Stock Exchange, et al. v. State Tax Commission, et al.*, 429 U.S. 318 (1977)—in which Commerce Clause claims were allowed where the plaintiff neither physically crossed state lines nor did first-hand business across state borders. Indeed, none of these cases were discussed or even cited by the court of appeals.

Respondent first attempts to distinguish these cases by suggesting that "standing was not challenged" or that

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[1] The assertion by Respondent and the court of appeals at App. 8a-9a, that Petitioners failed to allege an interest in interstate commerce is simply incorrect. Petitioners specifically alleged that they were harmed as a result of Ordinance 12's interference with Petitioners' access to the market, including those lower cost waste services that were available at out-of-state disposal facilities, Complaint ¶¶ 16, 24, 29, 31, and that they were asserting a claim for violation of their Commerce Clause rights. *Id.*, ¶¶ 53-65.

third-party standing was not discussed. Opp. at 15 n. 12. To the contrary, standing was vigorously contested, and *Warth* was cited in each of them.[2] The third party standing aspect of *Warth*, however, was not considered relevant because the doctrine simply did not apply. As in this case, each of the plaintiffs in those cases sought to vindicate its own rights, even though the interference with the stream of commerce technically took place at another point in the stream.

Respondent then offers an equally implausible alternative explanation, suggesting that in those cases "the plaintiff's connection with the regulated transaction went far beyond the indirect harm to personal consumer finances alleged by Petitioners," Opp. at 15 n. 12, and attempting thereby to justify the court of appeals' conclusion that consumers are somehow inherently excluded from the zone of interests of the Commerce Clause. Neither Respondent nor the court below, however, offer any authority for the proposition that economic injury in the form of "harm to personal consumer finances" merits any less protection than other economic harms, or that corporate economic injury is somehow more privileged than individual economic harm.[3] Moreover, Respondent conveniently ignores the fact that the Plaintiff class includes thousands of businesses who suffered millions of dollars of financial injury from illegally inflated tipping fees.

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[2] *Wyoming*, 502 U.S. at 446-454; *see also id.* at 465-466 (Scalia, J., dissenting); *Hunt*, 432 U.S. at 341-345; *Boston Stock Exchange*, 429 U.S. at 320-321 n. 3.

[3] An obliquely stated premise of the court of appeals' analysis is a concern over the extent to which all consumers, however remotely situated, might have rights under the Commerce Clause if standing is allowed here. Such concern is misplaced. Petitioners are not merely far-removed consumers. The waste Petitioners produce constitutes the very item of commerce the County sought to regulate by preventing it from crossing state lines.

C. The Court of Appeals' Decision Depends on an Artificial Isolation of the Participants in the Chain of Commerce

Respondent and the court of appeals attempt to avoid the obvious inconsistency of the result in this case with established precedent by creating artificial distinctions among participants in the chain of commerce. The court of appeals asserted that the generators' claims "turn on the right of the *haulers* to be free of the Ordinance's designation requirements," Opp. at 9; App. 13a (emphasis in original).[4] This attempted distinction ignores the interdependence of participants in the chain of commerce and the individual entitlement of each link in that chain to the protections of the Commerce Clause. No participant engages in interstate commerce in isolation. The camp plaintiff's claim in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 117 S.Ct. 1590 (1997), depended on the freedom of the campers to come to Maine for summer camp. The rights of the apple grower plaintiffs in *Hunt* depended on the ability of apple distributors to ship their produce to other states. The backhaul arranger plaintiff's claim in *Government Suppliers Consolidating Services v. Bayh,* 975 F.2d 1267 (7th Cir. 1992), *cert. denied,* 506 U.S. 1052 (1993), depended on the ability of haulers to haul waste across state lines. Each of those plaintiffs was critically dependent on the rights of others through whom they transacted business to be free from discriminatory actions; none of them crossed state lines themselves, yet all had standing.

The artificiality of tying Commerce Clause rights to the participant in the chain who passes between state borders is most tellingly illustrated by *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 504 U.S. 353 (1992), where the landfill plaintiff was

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[4] It should be noted, however, that Respondent previously argued it was the *haulers* who lacked standing because it was the *generators* who actually bore the economic burden of the County's action. *See* footnote 7, *infra.*

physically unable to cross state lines; the plaintiff there was just as dependent on haulers to bring it waste as Petitioners are here to remove their waste. Respondent completely fails to explain how a landfill "waiting for waste at the gate" is different from a generator "putting the can on the curb." *Cf.* Opp. at 15. Similarly, the plaintiffs in *General Motors Corp. v. Tracy*, 117 S.Ct. 811 (1997), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), did not physically carry goods across state lines, were completely dependent on intermediary shippers, and were simply interested in obtaining lower cost natural gas and liquor, respectively. The distinction between Petitioners and those plaintiffs is purely semantic.

D. A Requirement of "Direct Liability" Cannot Be Reconciled With This Court's Precedent Granting Standing to Unregulated Parties

The court of appeals attempted to distinguish *Tracy*, *Bacchus*, and *Camps* by noting that the plaintiffs there were "directly liable" under the challenged statutes. App. 12a. Requiring a showing of "direct liability" for Commerce Clause standing also contradicts this Court's precedent. In *Boston Stock Exchange* the Court explicitly noted that the plaintiff exchanges themselves suffered only "indirectly" as a result of the imposition *on others* of a discriminatory tax that violated the Commerce Clause, 429 U.S. at 320 n. 3, yet also explicitly found standing because they were in the "zone of interests" of that constitutional guarantee.[5] Nor can the court of appeals' decision be reconciled with *Hunt*, where Washington apple growers themselves, as well as the dealers they contracted

[5] "The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax *indirectly* infringes on that right. Thus, they are 'arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.'" 429 U.S. at 320-321, n. 3 (citing *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1970) (emphasis supplied)).

with to move the apples interstate, were held to have standing to challenge a discriminatory North Carolina law. These decisions make sense only as part of a Commerce Clause doctrine that recognizes the interconnectedness of the links in the chain of commerce. The court of appeals' contrary decision is antithetical to the Commerce Clause "vision of the Founders" and "the doctrine of this Court which has given it reality." *Dennis v. Higgins*, 498 U.S. 439, 449 (1991) (citation omitted).[6]

E. Petitioners Satisfy Even a "Direct Liability" Standard

While the cases discussed above illustrate that Petitioners need not meet any special test for "direct" liability, a continuing misconception advanced by Respondent demands response. There is no doubt that Petitioners are, and were from the beginning intended to be, the object of the County's discriminatory regulation. By Respondent's own earlier admission, the haulers were nothing more than a conduit through which the County could accomplish its ultimate goal: imposing higher tip fees on Petitioners in order to effectuate a change in the behavior of waste generators.[7] Respondent concedes that it anticipated and *wanted* to increase costs for Petitioners. *Id.*;

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[6] Respondent's invocation of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), is particularly disingenuous and inapposite here. Beyond the fact that Respondents argued the exact opposite before the district court (*see* footnote 7 *infra*), the indirect purchaser rule of *Illinois Brick* was explicitly derived from the unique statutory framework of the Sherman Act. *Id.* at 736. *California v. ARC America Corp.*, 490 U.S. 93, 102-103 (1988). It has never been applied by this Court outside of the antitrust context, let alone to remedies for constitutional violations.

[7] As noted by the trial court: "In arguing that the haulers lacked standing in *Oehrleins*, the County stated to this court that 'the full cost of solid waste management was made visible and obvious to, and borne by, the waste generators.'" App. 49a (citing Def.'s Mem. Opp. Summ. J. at 5).

Opp. at 5 n. 5.[8] Ordinance 12 was aimed squarely at the generators, and it was the generators who felt its pinch.[9]

F. The Court of Appeals' Decision Resurrects a Distinction Between the Reach of the Affirmative and Dormant Aspects of the Commerce Clause That This Court Has Rejected

Finally, as specifically applied to the commerce involved in this case, this Court has held both that solid waste is an article of interstate commerce, and that, with regard to solid waste, there is no difference between the reach of the affirmative Commerce Clause and the dormant Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 621-623 (1978); *see also Camps*, 117 S.Ct. at 1597. Respondent attempts to justify the court of appeals' decision by suggesting that generators can "wash their hands" of their waste merely by putting it out on the curb, Opp. at 15, and that they thereby somehow insulate themselves from the reach of the Commerce Clause. This narrow view of commerce cannot be squared

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[8] Respondent's current suggestion that the ultimate impact on the generators was somehow uncertain, *cf.* Opp. at 5, is a transparent after-the-fact effort to recast the impact of the Ordinance. Respondent expressed no such equivocations at the time the Ordinance was enacted. The County required generators to use County-licensed haulers, through whom the County completely controlled the flow of waste. Ordinance 12 at § III Subs. I (App. at 93a-94a). The County's Designation Plan counted on, and itself stated that, "tipping fees *would have to be passed on by haulers* to their customers," *see* App. at 10a n. 7 (emphasis supplied), and the County represented to the trial court that the "full cost" was in fact borne by the generators, not the haulers. *See* note 7, *supra*.

[9] In this sense, Ordinance 12 was an even more direct regulation on Petitioners than on the "directly liable" parties in *Tracy* and *Bacchus Imports*. In those cases, the State intended the burden of its regulation to fall elsewhere, and General Motors and Bacchus Imports could have avoided any tax liability at all by purchasing natural gas and liquor, respectively, in-state with minimal if any impact on themselves. Petitioners here were forced to participate in the County's system, and had no option of taking their waste anywhere else.

with cases upholding the regulatory reach of federal laws governing the generation, transportation, disposal, and cleanup of hazardous and solid wastes. *See* the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 et seq. (RCRA) (authorizing regulation of generators at §§ 6921-22), or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 et seq. (CERCLA) (establishing generator liability at § 9607).[10] The court of appeals directly conflicts with *Camps*, 117 S.Ct. at 1597, when it finds that the very same generators who can be regulated under the affirmative Commerce Clause are unable to claim the protections of the dormant Commerce Clause.

II. THE COURT OF APPEALS' DECISION IMPROPERLY CONSTRAINS DISTRICT COURT CONSIDERATION OF DISCRIMINATORY PURPOSE AND EFFECT

The court of appeals' analysis of so-called "intrastate" designation (Ordinance 12 as enforced after 1993) also reflects a fundamental misconception of this Court's Commerce Clause jurisprudence. Even after "suspension" of full enforcement of Ordinance 12, access to the Hennepin County market was limited to those out-of-state interests who could compete with the preferred local facility while still keeping their own processing facility out-of-state. This sort of partial access does not automatically take the case out of the rule of *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). In forbidding the trial court from even considering whether this and other evi-

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[10] *See Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276-277 (1981); *United States v. Rogers*, 685 F.Supp. 201, 203 (D. Minn. 1987) (citing *Hodel* in holding that RCRA is a valid exercise of the Commerce power); *Wickland Oil Terminals v. ASARCO, Inc.*, 654 F. Supp. 955 (N.D. Cal. 1987) (citing *Hodel* in holding that CERCLA is a valid exercise of the Commerce power). Residential generators are exempted from CERCLA liability for policy reasons by statute, not out of any limitation under the Commerce Clause. *See* 42 U.S.C. § 9601(9)(B).

dence [11] could show discriminatory effect or intent, the court of appeals eliminated the application of strict scrutiny for Commerce Clause violations in all but the most blatant, facially discriminatory cases. The court of appeals' willingness simply to brush aside archetypal evidence of discrimination, and its de facto fashioning of a "good faith" exception to Commerce Clause liability, merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 24, 1997

[11] Respondent's argument that allowing the district court to consider further evidence of discriminatory purpose and effect would "serve no purpose" because the court of appeals rejected all the evidence before it, Opp. at 25-27, is contradicted by the very cases it cites in support of that proposition. In *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), this Court rejected the proffered evidence of discriminatory purpose only when viewed "in context," *id.* at 463 n. 7, upon review of a complete record compiled after "extensive evidentiary hearings," *id.* at 461. Similarly, in *Maine v. Taylor*, 477 U.S. 131 (1985), the Court again had the benefit of a full record. *Id.* at 140. It is one thing for the court of appeals to conclude (erroneously in Petitioners' view) that a letter from the Deputy County Attorney provided 12 days before the County adopted the exact approach he proposed was insufficient evidence to demonstrate discriminatory purpose as a matter of law on summary judgment. It is quite another, however, for it to conclude that it is no evidence at all.